Supreme Court, U. S.
FILED
MAY 10 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. **76-1570**

FREDDIE D. ROBINSON, *et al.*,

Petitioners,

VS.

UNION CARBIDE CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners Freddie D. Robinson and the class of unsuccessful black applicants for employment at Union Carbide's Chickasaw, Alabama plant pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The opinion of the United States District Court for the Southern District of Alabama is reported at 380 F.Supp. 731 and appears at Appendix A hereto, pp. 1a-26a. The first opinion of the United States Court of Appeals for the Fifth Circuit is reported at 538 F.2d 652, and appears at Appendix B hereto, pp. 27a-41a. The second opinion of the United States Court of Appeals for the Fifth Circuit is reported at 544 F.2d 1258 and appears at Appendix C hereto, pp. 50a-64a.

Jurisdiction

September 10, 1976, the Court of Appeals affirmed in relevant part a judgment of the district court. Petitioners filed a timely Petition for Rehearing and for Rehearing En Banc. January 10, 1977 the Court of Appeals entered a second judgment again affirming in relevant part the district court's judgment. On April 8, 1977 this Court extended the time for filing a petition for writ of certiorari to May 10, 1977. This Court has jurisdiction under 28 U.S.C. §1254(1).

Question Presented

Whether the Court of Appeals erred in holding that under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e), a class of black applicants for employment can establish a prima facie case of unlawful discrimination *only* upon proof that the number of blacks hired is disproportionately lower than the number of blacks in the *area population,* despite the clearest proof that the proportion of qualified blacks in the employer's *pool of actual applicants* was twice the proportion of blacks in the employer's group of new hires.

Statutory Provisions Involved

Section 703 of Title VII of the Civil Rights Act of 1964 [42 U.S.C. §2000e-2(a)] provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

> compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Statement of the Case

Seven black employees and two black unsuccessful applicants for employment at Union Carbide's Materials System Division filed their complaint in the United States District Court for the Southern District of Alabama on March 15, 1973 charging the Company with racially discriminatory hiring, promotion and other employment practices in violation of 42 U.S.C. §2000e et seq. and 42 U.S.C. §1981. The district court's jurisdiction derived from 42 U.S.C. 2000e(f) and 1343(4) and the case was certified as a class action on behalf of black employees, future black applicants and some 3000 blacks whose applications for employment were still on file with the Company. The district court entered judgment for the defendant holding that since blacks constitute 28% of the Mobile area general population there is "no substantial disparity between the percentage of black employees of the defendant and blacks in the labor force in the Mobile area. Approximately 31% of the employees hired by the defendant during 1970, 1971, 1972 and 1973 have been black." 380 F.Supp. 738-39.

Appendix A, p. 14a.[1] The appeals court affirmed the district court's finding that census tract data was "more reliable and indicative of racial discrimination" because applicant pool analyses are "subject to suspect data such as duplication of employment applications." Since "[o]n many occasions federal courts have compared the composition of the company's work force to the composition of the labor force in the surrounding area," to determine whether a prima facie case had been established, the court concluded "that the record presents sufficient underpinning to support the ultimate finding that Union Carbide did not engage in discriminatory hiring practices." 538 F.2d at 658, Appendix B, pp. 37a-38a.

Petitioners conducted a meticulous study of black and white applicant success rates. They copied all application forms in the Company's employee and applicant files, eliminated all duplications and identified applicants by race.[2]

[1] The district court also found no discrimination in the Company's promotional practices. The appeals court reversed on this issue holding that there was "a substantial statistical discrepancy," between the number of blacks in the Mobile general population and the number of blacks granted promotions or in supervisory positions, 538 F.2d at 661. Appendix B, p. 42a. The appeals court reached the correct result but for the wrong reasons: assuming no discouragement or other obstacles to blacks making application for promotions, the correct inquiry would compare the number of blacks applying for promotions to the number of blacks obtaining promotions; however, Company employees were not required to apply for promotions, 538 F.2d at 661, Appendix B, pp. 43a-44a, and accordingly, a prima facie case of unlawful promotional practices was established because blacks were being promoted in numbers disproportionately lower than their number in the Company's work force.

Issues relating to promotion practices and class action procedures were resolved by the Court of Appeals in petitioners' favor and are not further discussed herein.

[2] The race of the applicants was determined through company records or, in a few instances through an analysis of the schools an applicant attended under the dual racial system.

It was established that from January-August, 1973, 889 blacks and 804 whites applied for employment.[3] From that pool, the Company employed one black and eleven whites into salaried ranks and seven blacks and thirty whites into wage ranks. In other words, blacks constituted more than 52% of the total 1973 applicant pool, but from that pool only 8.3% of those employed into salaried positions and only 18.9% of those employed into hourly wage positions were black. An identical study made of 1972 applicants showed that of the 1095 blacks who applied only 14 obtained hourly wage jobs and only 2 obtained salaried positions; of the 961 whites who applied during the same year, 34 obtained wage jobs and 6 obtained salaried jobs. The Company introduced alternative summaries of applicant success rates which revealed substantially the same pattern: whites were outnumbered by black applicants for the period 1971-73 but were more than twice as likely to be hired (that is, the 4.6% white "success rate," was 2.4 times as great as the 1.9% black "success rate"). 538 F.2d at 658, Appendix B, p. 36a.[3a] Petitioners' expert, a statistician, compared the applicants to determine whether non-racial factors could explain the disparity. He found, for example, that among applicants for wage positions blacks had *more* formal schooling while among applicants for salaried positions there were no significant differences. Nor could the disparities be explained by comparing the applicants' work histories. Petitioners' expert therefore concluded and testified that there were significant correlations, at the 99% confidence level, between race and the likelihood of being hired.

[3] The study of 1973 data occurred in August or September, 1973 and data for the balance of the year was of course not then available.

[3a] The Court of Appeals erroneously referred to the statistics appearing at Appendix A, p. 36a, as advanced by petitioners; they are defendants figures.

Carefully analyzed statistical data and related application information was but one facet of the proof. Petitioners also introduced uncontradicted evidence demonstrating that selection criteria controlling new hires (and promotions) were entirely subjective. 538 F.2d at 655-56, n. 5, Appendix B, pp. 31a-32a, n. 5.[4] They also offered compelling proof that several named plaintiffs and class members failed to obtain employment (or promotions) despite superior qualifications.[5]

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided a critical question arising under federal statutory law prohibiting employment discrimination which should be settled by and is now pending in this Court [*Hazelwood School District* v. *United States*, No. 76-255]: what is the relevant data base for assessing whether an employer's policies and practices have a discriminatory impact? The Court of Appeals has held that area census tract data is the "more reliable" base. The court refused to consider stipulated

[4] The personnel manager testified that "there are so many factors I don't know if I could spell out or say that you do not use this factor or do use this factor." Applicants are interviewed by three managers who make recommendations based on *their* (the managers) "background and experience." Appendix B, p. 32a, n.5.

[5] For example, plaintiff Cynthia Caldwell who applied for a "laboratory technician" position has a B.S. in Biology with a minor in Chemistry. This educational background was identical to that required by defendant's written job specifications. Defendants argued that Ms. Caldwell did not obtain the position because she was "overqualified." They could not reconcile this assertion with their job specifications nor could they explain why whites with identical educational backgrounds were hired as "laboratory technicians" immediately before and after plaintiff Caldwell. The appeals court declined to consider this proof, holding that since defendants' work-force mirrored black representation in the Mobile area population a prima facie case of unlawful discrimination was not established and thus that further inquiry was foreclosed. Appendix B, p. 38a.

or uncontroverted evidence that a substantially higher percentage of blacks in the Mobile, Alabama census area were unemployed and that blacks *who actually applied* at Union Carbide were less than half as likely to be hired as their white counterparts.

This holding is facially invalid: it shields a Company's hiring policies and practices from a Title VII inquiry even if 100% of an area's unemployed and 100% of the Company's applicants are black provided only that blacks are employed in proportion to their representation in the area's general population. Thus the appeals court holding, if allowed to stand, will insulate an employer from charges of unlawful employment discrimination if it establishes "negative quotas," *i.e.*, if it determines to hire blacks only in proportion to their percentage in the area work-force. And judicial approval of such "negative quotas" will have a brutal effect upon blacks because they are represented among the unemployed in disproportionate numbers, particularly during times of recession, and because their recent employment gains are often erased by judicially approved "last-hired-first-fired" seniority systems.[6]

The relevant Title VII inquiry is always: is the racial composition of the pool from which the Company draws its employees substantially different from the racial composition of the Company's pool of new employees? Absent proof that blacks have been discouraged or precluded from making application,[7] accurate data reflecting the

[6] *Watkins* v. *United Steelworkers of America, Local No. 2369*, 516 F.2d 41 (5th Cir. 1975); *Jersey Central Power & Light Co.* v. *Local Union 327*, 508 F.2d 687 (3d Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); *Waters* v. *Wisconsin Steel Works of Int'l Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

[7] *Morrow* v. *Chrisler*, 479 F.2d 960 (5th Cir. 1973), *on rehearing en banc*, 491 F.2d 1053, 1055-56, *cert. denied*, 419 U.S. 895 (1974)

number of applicants by race is, by definition, the exact pool from which the Company draws its new employees and it is therefore the most refined yardstick for gauging the impact of Company selection procedures and criteria.[8] *Hazelwood School District* v. *United States, Brief for the United States,* pp. 21, 27-29. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 801, 802 (1973). For this reason, EEOC Guidelines on Employment Selection Procedures hold that "differential rates of applicant rejection," are critical to prima facie proof of unlawful employment discrimination. 29 C.F.R. 1607.13.[9] Regulations promulgated jointly by federal agencies charged with enforcing the antidiscrimination injunctions of Presidential Executive Order 11246 also prescribe actual applicant analysis as the preferred method of determining whether selection procedures have adverse racial impact.[10]

(Applicant data not useful because it was common knowledge that the Mississippi Highway Patrol had never employed any blacks and that blacks were not welcome.) *Lea* v. *Cone Mills Corp.,* 301 F. Supp. 97, 102 (M.D. N.C. 1969) (Word of mouth recruitment by all white workforce and practice of preferring relatives and friends of employees for new vacancies, taints applicant data.) The government's brief in *Hazelwood* summarizes factors which can taint applicant data. And when applicant data is so tainted or is incomplete courts must estimate the racial composition of the applicant pool by reference to other census data. *Id.*

[8] Of course, the statistical data are used to establish a prima facie case and measure the impact of Company policies. A Company may rebut the inferences drawn from the statistics by proof that its selection criteria are a "business necessity," or that as to any particular applicant for employment, discriminatory selection criteria were not at the foundation of the Company's refusal to hire.

[9] EEOC Guidelines are "entitled to great deference." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 433-34 (1971); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975).

[10] See Question 3, *Questions and Answers on Employee Selection Procedures* jointly adopted by the U.S. Civil Service Commission, the Office of Federal Contract Compliance Programs, and the U.S. Department of Justice, 42 F.R. 3826 (January 17, 1977), interpreting and clarifying Section 4 of the *Federal Executive Agency Guidelines on Employee Selection Procedures,* 28 C.F.R. §50 14.4 (1976).

In *Hazelwood School District* v. *United States,* No. 76-255, petitioners state the issues presented as:

> Whether a court may disregard evidence that an employer has treated actual job applicants in a non-discriminatory manner and rely on undifferentiated workforce statistics to find an unrebutted prima facie case of employment discrimination in violation of the Civil Rights Act of 1964.
>
> *Brief for Petitioners,* p. 4.

The government in *Hazelwood* acknowledges that statistical data comparing the racial composition of the pool of applicants to the racial composition of the pool of new hires may indeed be a relevant inquiry, but they argue that because many application forms were destroyed by Hazelwood officials and because the method of identifying the race of applicants was suspect, the data base was not available. *Brief for the United States,* pp. 12, 25-26, n. 22 and n. 23, p. 5, n. 6. Thus both parties to the *Hazelwood* litigation acknowledge that the appeals court holding in the instant case—rejecting all but census tract data as a matter of law—was too restrictive.

CONCLUSION

For the foregoing reasons petitioners pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

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May, 1977

APPENDIX

APPENDIX A

(*Robinson* v. *Union Carbide*, Civil Action No. 7583-73-H, United States District Court for the Southern District of Alabama, August 29, 1974.)

Opinion of District Court

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HAND, *District Judge.*

This cause originated in this Court on March 15, 1973 when plaintiffs, Freddie D. Robinson, Thomas S. Austin, Jr., Willie L. Jones, Olney W. Lucious, III, Willie J. Mickles, Peter Reese, Jr., Paul Richardson, Cynthia Caldwell, Jerome G. Fitts and Ronald L. Coleman filed this action on their own behalf and on behalf of all other persons similarly situated, pursuant to Federal Rules of Civil Procedure, Rule 23, to secure protection and to redress deprivation of rights secured by Title 42, U.S.C., Section 2000e et seq. and Title 42, U.S.C., Section 1981.

By Order of the Court on the 7th day of January, 1974, the Court held this cause was proper for a class action and the class was defined as:

> "Those black job applicants who had an outstanding job application at the time of the commencement of this cause and those black job applicants who have filed job applications since the commencement of this cause and all future black job applicants, along with all current black employees of defendant, Union Carbide Corporation, Materials Systems Division."

After extensive discovery, a Pretrial Conference was held wherein the questions to be determined by the hearing were delineated. Though these triable issues were re-

duced to five in number covering a fairly wide range of alleged discriminatory practices, the main point advanced throughout the entire course of this litigation, both in arguments on motions, in conference, and upon the trial itself, was the expressed desire of the plaintiffs' counsel, through the aegis of this class action, to establish a new requirement of law, to become applicable nationwide, relative to the hiring practices of industry as they deal with minority employment problems; viz., whether or not the rule established, or fastly becoming so, that industry must demonstrate a ratio (quota) of minority to majority employees commensurate with that in the labor market available, failing in which there is prima facie discrimination, is the appropriate rule, or whether or not the better rule would be that the employment ratios (quotas) must equal the application ratios. Translated to the case at hand, it was argued that where it is shown that as to the hourly rate employees, 26 percent were black and 74 percent were white, closely paralleling the work force ratio in the Mobile area, there was invidious discrimination being practiced by the employer because the application ratio was more nearly 50-50, and unless the employment practices were or are such as to accomplish this ratio in employment, it is prima facie that the employer is practicing racial discrimination.

Where counsel may now urge strongly the other points raised, this Court was pressed over and over again that the application ratio to hiring was what counsel desired to establish by this action; therefore, this was the desired relief sought by the class.

This record also shows, with unabashed frankness, the limits employed by the plaintiffs representative in utilizing

the courts to establish pet theories. In the not too distant past it was considered by law schools, the Courts, and the legal profession as a whole that solicitation of litigation was unethical. One of the reasons advanced for this "growing more antiquated" theory was that the law favored compromise, not the stirring up of controversy.[1] In this instance, the Legal Defense Fund sent runners, now called "investigators", into this area to determine the conditions of employment in various industries and to seek out and encourage those who were reluctant to participate by representing to them that it would cost them no dollars to do so, either by way of attorneys fees or in expenses, and might result in dollars in their pockets if successful. Those who could be so persuaded were referred to associate counsel who would then undertake to represent them in this endeavor.

Though there are viable theories and approaches to the redress of grievances in this type situation sanctioned by historic experience, the modern art of the law is set to encourage solicitation of business by clothing the "solicitors" with the grand name of "private attorneys general" whose duty it is to encourage controversy and to seek out and redress wrong.[2] What perfidy.

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[1] One would assume from the Judeo-Christian theory of "Blessed are the peacemakers".

[2] Code of Ethics, Alabama State Bar Association, December 14, 1887:

"Disreputable to Stir Up Litigation.

"20. It is indecent to hunt up defects in titles and the like and inform thereof, in order to be employed to bring suit; or to seek out a person supposed to have a cause of action, and endeavor to get a fee to litigate about it. Except where ties of blood, relationship or trust, make it an attorney's duty, it is unprofessional to volunteer advice to bring a law suit. Stirring

Appendix A

Again translated to the case at hand, we have an industry whose number of minority hourly employees is in proportion to the available labor force, yet they are sued to establish a new concept of what the law should require, as conceived by some pronouncement from a shrouded Olympus, and to be wrought from the courts by the solicitation of a clientele as a needed vehicle. Again we lament, there is obliged to be a better solution to establish a new

---

up strife and litigation is forbidden by law, and disreputable in morals."

Canons of Professional Ethics of the American Bar Association:

"28. STIRRING UP LITIGATION, DIRECTLY OR THROUGH AGENTS.

"It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred."

"42. EXPENSES OF LITIGATION.

"A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

See annotation 139 A.L.R. 620.

Appendix A

law than by legislative and/or court sanction of the destruction of the high quality of the legal profession. What tragedy that lawyers and the courts allow themselves to be used in transforming the legal profession from that of a true profession to that of a business. It is indeed with sad heart that we bid a fond farewell to what was once the legal definition of the words "champerty" and "barratry".

Having departed this island of legal ethic, let us travel on to the next port of call. The Bible makes mention of the visitation of the sins of the fathers to the children, even to the seventh generation. Once there was a time when it was entirely permissible to ride a horse down the main thoroughfare. Today it might arguably be said that to do so would obstruct traffic, therefore it is illegal. Having determined that it is illegal, we must now go back and punish all of those who ever rode horses down the street. Idiotic analogy? Of course, but it is not too far from the mark of apparent present day philosophy when considering laws affecting race relations.

Reference here is to the retroactive effect given the "penalty" phase of the present state of the law which imposes on this generation the past deeds of our forefathers. "Penalty" is probably too harsh a term—it is studiously avoided—"reparations" may be a more apt or "in" term.[3] When James Foreman preached from the pulpits that the black man was entitled to five hundred million dollars in reparations from the white man the idea was considered shocking. Measured by the ultimate cost to present day industry and thus the public generally, the end result of the present direction of court decrees can only be translated into a burden on this generation that will far surpass the wildest imaginings of Mr. Foreman.

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[3] A rose by any other name smells as sweet.

Appendix A

Legislation or court decree directed in an effort to correct past policies of discrimination is highly desirable, for all men must stand equal before the law, but if too high a cost is placed upon this effort, history teaches that it will have less chance of ultimate success for, right or wrong, life seems to be a matter of economics even where morals are concerned.

The law has recognized this axiom in another way. An example is to be found in tort law where evidence of subsequent correction cannot be introduced to prove past defalcations. The theory is that if such were not the law man would not correct his past errors.

In the realm of "reparations" the courts themselves have recognized the extreme difficulty in adopting a rule by which past defaults are to be compensated. Indeed as one court has said: " • • • the • • • effects of discriminatory practices • • • continued over an extended period of time calls forth the quagmire of hypothetical judgment discussed earlier • • •. It should be emphasized that this is not a choice between one approach more precise than another. Any method is simply a process of conjectures. • • •" So, to award "penalties", or "reparations" if you please, we now resort to speculation, conjecture and surmise.

It is disturbing, also, that the doctrine of "good faith" is to be abandoned when the question of "reparations" are in issue. The reasoning advanced to cover this abandonment of principal is that back pay awards are to "compensate for economic loss" and "not as punishment for past discrimination or as a prod to further compliance". Such thin-veiled distinction in an effort to avoid the use of the term "penalty" cries out for the forthright approach if we are to express true intellectual honesty.

Appendix A

Where manipulatable statistics invariably cast the burden upon the defendant to exonerate himself of guilt, where guidelines affecting employment practices are established by government agency that are so stringent that no industry has successfully met the burden of their requirements to the satisfaction of the courts (testing), where good faith efforts to comply with the change in the law are not to be considered, and where the substantial burden or "maximum burden" is placed on the defendant on proof of loss of back wages, calling the result an award for "economic loss" does not change its true character from that of "penalty". This is particularly true where past acts had the sanction of law or custom at the time.

Thus departing these murky shores we cast a weather eye to the next island in the archipelago. This misty isle has a towering peak that comes and goes through the fog of legal definition. We address ourselves to what may otherwise be defined as "quotas" and which is apparently so hideous to view that the courts have tried to hide it with a fog of legal jargon that only lightly veils the outlines of the summit.

42 U.S.C., Section 2000e-2(j) provides in pertinent part:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter (Title VII) to grant preferential treatment to any individual or to any group . . . or (to require employers to employ) in comparison with the total number or percentage of persons of such race . . . in any community, State, section or other area . . .

Executive Orders number 4 and 11246, originally signed by President Johnson but later revised by the Department of Labor, require institutions to give preferential treat-

ment to minorities in hiring and promotion practices and require that goals and timetables be filed annually by each affected employer. These Orders cover about 95 percent of the employment market. The power of government in its direct employment policy and in its ability, through indirect means, to coerce those doing business with it in their employment policies have, through these Executive Orders, all but subverted the wording of the aforementioned section. Though it is insisted that "you never have to hire any unqualified person" or "obtain any set number of employees of a given race", government has required that affirmative action policies be established which must reflect active programs to accomplish the employment of minority groups to specified levels, failing in which economic pressures and sanctions are imposed as punishment sometimes consisting of loss of contracts, etc.

In a recent interview carried in the New York Times Magazine section, Archibald Cox expressed himself very forcefully on the proposition that the "end" does not always justify the "means". The logic expressed in that article was quite sound and applies with full vigor to solutions of problems involving race relations. Most often, success in meeting affirmative action programs established pursuant to government prodding or, as in the case of the industry under present consideration by this litigation, voluntarily, is almost universally measured by a showing of the proper proportion of minority to majority hires. Called what you want, this translates into "quotas". (It must be considered a breath of fresh air sweeping up the face of the mountain and dissipating the fog when the appellate court of this Circuit acknowledges in unvarnished terms the requirement of quotas until past practices of invidious discrimination are finally dissipated.)

Though here again there are viable alternatives to the imposition of "quotas" in an effort to secure compliance with the non-discrimination policies of government, we are fast becoming grounded on the premise that this society, once priding itself as being the melting pot of all classes and kinds, is very distinctly a class conscious society that must be proportionately represented in all areas of endeavor. It would do no good to explore alternatives for we are well beyond the point of these considerations, but do let us stop and examine the danger attendant with the philosophy advanced by plaintiffs' counsel through this class action, for it seizes upon the art and kicks it a long way up the slope.

What now fixes the "quota"? The implication of present decision law is that if industry employs blacks below the ratio of minority to majority in the area work force it is prima facie evidence of discrimination. As affecting the industry involved in this case, the evidence is that the hourly employees meet the quota as established by this ratio. However, the ratio of applicants more nearly approximates 50-50, which is considerably higher than the ratio of minority to majority in the work force, ergo, this industry discriminates. This is so because these statistics, as in other cases, show a prima facie case of discrimination and therefore the burden shifts to the industry to prove that it has some justifiable business purpose why the employment ratio ought not to be 50-50. Advancing the same argument to its ultimate conclusion, you can envision a situation where the number of applications were maneuvered to or legitimately filed so as to reflect 100 percent with the result the industry employees would become all black or nearly so. This is a strange anomaly. An industry could never become all white without being discriminatory, but it could

become all black without being discriminatory—(at all cost we must avoid situations that would require considerations of questions of reverse discrimination). Another glaring anomaly is that if such theory is accepted and followed, what occurs when the ratio of applicants vary from day to day, week to week and year to year? Industry would never know when it was or was not in compliance, and can't you imagine the argument if the application ratio fell below the area work force ratio!

Union Carbide, the defendant, was established in Mobile County in 1965. It has in its employment over 26 percent of its hourly employees who are members of the minority group; in addition, it is actively recruiting minorities in its salary and professional employee classifications. This defendant has an affirmative action program which compels them to actively recruit members of minority groups and they are currently employing minorities in an excess of 30 per cent per annum.

The Court appreciates the past economic plight of the black people in the South and specifically in the Mobile labor market, but it also can appreciate that prior to the mid-1950's whites, as a class, were economically near the poverty level. In the 1950's industries began to expand and moved to the South which assisted the financial growth of all the people. Subsequent to the passage of Title VII, the major industries in this locality, Alcoa, Scott Paper Company, Courtaulds North America, Inc., International Longshoremen Association have in their employment in excess of 26 per cent of their employees who are members of minority groups, with the ILA having a membership in excess of 95 percent black. These same companies are now employing minorities at a 30-40 percent rate.[3]

[3] Prior case statistics filed in this Court.

This Court is not blind to the fact that in substantial measure this present day hiring practice was brought about by a change in the law and emphasis thereon. Indeed this is the hoped for result where any law charts a new plotted course. As the Court of Appeals has indicated, we are not here concerned with motives but facts. If we are to measure the liability of this defendant by its maintaining its "quota" it passes muster unless we adopt the plaintiffs' theory, and even if we should, the defendant has shown sufficient business purpose to justify its discrimination in the selection of its employees. (I realize the use of the term "discrimination" in the foregoing sentence may be badly chosen and possibly "selectivity" or something of that nature would be better used, but I believe the word still carries a connotation that ought to be acceptable and it is in that connotation that it is used.)

Having set out the parameter of the law which must guide this Court's determination of the issues involved let us consider with more specificity the facts as they apply to the remaining issues.

Findings of Facts

1. This Court has jurisdiction of this case pursuant to 28 U.S.C., Section 1343(4); 42 U.S.C., Section 2000e(f) and 28 U.S.C., Sections 2201 and 2202. Defendant is charged with violating (a) Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e et seq., (b) 42 U.S.C., Section 1981, providing for the equal rights of all persons in every State and Territory within the jurisdiction of the United States.

2. Union Carbide is an employer in an industry affecting interstate commerce within the meaning of Section

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706(b) of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e-5(b).

3. Plaintiffs have complied with the procedural requirements of Section 706(a), (d) and (e) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(a), (d) and (e).

4. This case is filed as a class action making broad general allegations of violations of the Civil Rights Acts. The plaintiffs are black employees of the defendant or unsuccessful black applicants for employment with the defendant.

5. The defendant operates a high technology plant and manufactures a product known as "molecular sieves" at Chickasaw, Alabama. As of October 1, 1973, the defendant employed 314 persons at this plant; 180 of said 314 employees were hourly production, maintenance and warehouse employees and 46 or 26 percent of them were black; the remaining 134 employees were exempt and non-exempt salaried employees; 71 of said 134 exempt and non-exempt employees were engineers or technicians. The Mobile area work force in which this plant of the defendant is located consists of approximately 26 percent black or other minorities.

In production, there are three hourly job classifications: chemical operator trainee, chemical operator, and senior chemical operator. All of the production workers of the same job classification do not work in the same areas of the plant nor do they have the same duties, but they are all paid at the same rate, and have the same opportunities for advancement. In maintenance, there are the following hourly job classifications: group leader, mechanic, electrician A, maintenance man, electrician B, maintenance utility man, electrician C, oiler, helper, instrument tech-

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nician, and maintenance trainee. In the warehouse there are two hourly job classifications: group leader and warehouseman. There are no lines of progression, and employees may bid from one department to another on a seniority basis. A great majority of the hourly employees are classified as chemical operators in production. These chemical operators operate, regulate and control chemical processing equipment. A chemical operator earns $4.12 per hour after 9 months and averages earning about $10,000.00 per year counting shift differentials and overtime.

In the salaried ranks, there is a large number of job classifications, both exempt and non-exempt, but basically they can be categorized as: maintenance and production supervisors, engineers, managers, laboratory and other technicians, clerks, and clerical employees.

6. In addition to the blacks employed by the defendant in production in the chemical operation classifications blacks are employed in maintenance in the following classifications: maintenance mechanic, oiler, trades helper, stores attendant and in warehousing in the following classification: warehouseman. All hourly jobs are filled on a seniority bid basis with the skilled maintenance jobs requiring demonstration of the skill involved. Production jobs are worked on a rotating shift basis.

7. The defendant has black and other minorities employed in the following salaried positions: production foreman, employee relations assistant, plant accountant, quality control shift leader, quality control technician, quality control analyst, junior instrument technician, engineer, buyer, production clerk, stenographer, and clerk-typist.

8. The defendant's Chickasaw plant began operations in April 1965 and during the period 1965 through 1969 the

defendant employed 37 black employees and 166 white employees. In 1970 defendant hired 5 black employees and 9 white employees; in 1971 defendant employed 10 black employees and 7 white employees; in 1972 defendant employed 25 black employees and 48 white employees and in 1973 defendant employed 19 black employees and 68 white employees.

9. The defendant accepts applications for employment at all times, whether or not vacancies currently exist, and has an actively implemented affirmative action program for seeking, hiring, training and promoting minority citizens. The defendant's hiring procedures do not depend upon the subjective recommendation of any one person but require a diversified input of recommendations based on a written application by an applicant for employment and interviews with personnel department representatives and plant supervisory personnel as well as reference checks in order to determine an applicant's qualifications for and interest in the job applied for.

10. There is no substantial disparity between the percentages of black employees of the defendant and blacks in the labor force in the Mobile area. Approximately 31 percent of the employees hired by the defendant during 1970, 1971, 1972 and 1973 have been black.

11. The defendant has promoted and hired black and other minorities into salaried jobs and is implementing its adopted affirmative action program and actively seeking blacks and other minorities for engineering and technical jobs.

12. There is no discrimination in the defendant's promotion practice. Promotion procedures do not depend

upon the subjective recommendation of an employee's immediate supervisor but require a diversified input of names and applications for the vacancy and actively involve the line supervision, personnel department representation, and management in its selection process. There is no basis for hint or implication that here the white man will not comply with his obligation under the law and fairly consider all regardless of race. Indeed, the present process has established blacks in positions where they too are involved in decision making.

13. Plaintiffs make the argument that although the defendant's employment record at its Chickasaw, Alabama plant is good and bears a favorable balance in regard to the Mobile area work force, a survey of the total number of applications filed with the defendant during 1972 and 1973 indicates that approximately 50 percent of the applications are by black persons and the defendant hired only 34 percent black in 1972 and 22 percent black in 1973. The plaintiffs contend that in view of their statistics the defendant's hire rate of 34 percent and 22 percent black in 1972 and 1973 instead of 50 petrcent is prima facie discriminatory.

This argument and the evidence offered in support thereof failed to take into consideration that the applicant ratio is a constantly changing and fluctuating situation subject to all of the indefiniteness of application motivations and qualifications including the possibility of manipulation. The Mobile area work force is a fixed, determinable and recognized grouping and a plant work force with a black-white ratio nearly approximately the area work force with no evidence being presented of any deliberate design toward that end is strongly suggestive to this Court that the employer is not discriminating in its hiring procedures.

Defendant has provided truly equal access to the jobs at its Chickasaw plant by blacks and whites and the Court finds that this has in fact produced an employee population with substantially the same proportion of blacks represented as are in the Mobile area work force generally.

14. Defendant's efforts to involve minorities in its skilled maintenance jobs are to be commended. There is no evidence of any discrimination by the defendant in its skilled maintenance job training programs or in the tests used in these programs. The tests are job related and bear directly on the skills needed to perform the job. These tests did not disqualify blacks at a substantially higher rate than whites and blacks who have successfully completed these programs are performing successfully in skilled jobs with the defendant.

15. None of the named plaintiffs were denied an equal opportunity for promotion on account of his race.

16. None of the named plaintiffs were harassed on account of his race.

17. None of the named plaintiffs were denied employment by the defendants on account of unlawful racially discriminatory hiring policies or practices.

18. *Freddie Robinson*—This plaintiff alleged that he was denied an equal opportunity for promotion, was harassed, was refused his claim for disability pay, and was denied the opportunity to return to work when his doctor released him, all on account of racial discrimination by the defendant.

Plaintiff was employed by the defendant in December of 1968 and voluntarily quit his employment in May of 1973. During most of the time that he was employed he

also was attending college at a local university and had advised his fellow workers and the defendant that as soon as he had obtained his degree from the university he intended to terminate his employment with the defendant and seek another job. This he did. He graduated in May of 1973 and quit his employment the same month. During the last weeks of his employment an apparent conflict developed between the requirements of the job and the school. Plaintiff Robinson chose the school.

In March of 1973 plaintiff Robinson requested special treatment in arranging his work schedule to accommodate his school schedule. The accommodation could not be made due to the involvement of other employees and their asserted seniority rights. Failing in the rearrangement of his work schedule plaintiff Robinson announced that "I've got a way to work out the schedule". This occurred on Friday, March 23, 1973. His next scheduled work day was Monday, March 26. On that morning he called in sick. A routine investigation and medical examination did not verify this alleged sickness. In fact, Robinson was attending classes at the university during the period he was supposed to be unable to work. Failing to report for work as requested by the defendant he was suspended. Thereafter in May he voluntarily quit his employment. A required written application for disability benefits was never submitted by him.

The Court finds that plaintiff Robinson was not unjustly refused his claim for disability pay and was not wrongfully denied the opportunity to return to work. The Court further finds that the defendant's action in not paying plaintiff Robinson disability pay and in suspending him from his job for failing to report as designated was based on valid employer prerogatives and was not the result of

discrimination against this plaintiff on account of his race. Also in accordance with the Court's other findings of fact no basis is found for this plaintiff's allegation of harassment or denial of promotion as a result of racial discrimination. This plaintiff's announced intention to quit his employment upon graduation from college removed him from consideration for promotion, assuming he was qualified for the job opening. Also, the Court does not find any racially motivated harassment of this plaintiff. All requirements made of this plaintiff were completely job related, non-discriminatory, and based on valid employer prerogatives.

19. *Peter Reese*—This plaintiff alleges that he was denied promotions on account of his race, in particular to the jobs of safety technician and semi-works technician. Plaintiff Reese was employed by the defendant in March 1968. Prior to his employment with the defendant he had worked as a medic in the army and as a medical technician in the reserve. While plaintiff Reese was in the initial weeks of his employment and in the training program for a chemical operator job, an opening occurred in the safety technician job in the defendant's plant. This job required the maintenance of a comprehensive plant safety program. The job involved the keeping of regular surveillance of the overall plant area to make and note on the spot inspections of unsafe actions and hazardous conditions; the coordination of the activities of the Employee Safety Committee; the conducting of formal plant safety inspections on a regular schedule; the investigation and analysis of accidents and injuries as well as certain first aid services. Complete familiarity with all phases of the plant operation was obviously a necessity. As a new employee plaintiff Reese did not have this familiarity. The job was awarded

to an employee with several years of overall plant experience. Further, plaintiff Reese made no application for this job and did not advise anybody that he was interested in this job. The Court finds no racial discrimination in the failure of the defendant to award this job to the plaintiff.

The semi-works is a small pilot testing operation separate and apart from the main production plant. The semi-works technician is required to work under the direct supervision of an engineer or semi-works technologist and to record and perform processing experiments and procure plant materials and data. This employee must be familiar with all phases of a molecular sieve plant and be able to operate all mechanical equipment in the semi-works laboratory, collect samples and plan and perform certain laboratory experiments. This job became available in May of 1971 and was awarded to a senior chemical operator with several years experience in all phases of plant operations. Again, Plaintiff Reese made no application for this job and did not advise anybody that he wished to be considered for the job. The Court finds no racial discrimination in the failure of the defendant to award this job to this plaintiff. Further, the Court finds that the employer's determination was based on valid employer prerogatives to employ the best qualified man for the job.

20. *Jerome Fitts*—Plaintiff Fitts alleges that he was harassed by his white supervisor by the use of abusive language and that such harassment was racially discriminatory. He testified that his foreman told him "to move those damn drums" and he felt this language was not professional and racially discriminatory. The Court finds from the evidence that these remarks were not racially motivated or discriminatory but only an attempt by a

foreman to get a job done. The defendant did not ratify or countenance them.

21. *Cynthia Caldwell*—Plaintiff Caldwell alleged that she was denied employment by the defendant because of her race. In particular she contends that she was qualified for a laboratory technician job and was not hired because she was black. Plaintiff Caldwell applied for work in February of 1972. She was a graduate of Tuskegee Institute with a major in biology and a minor in chemistry. She was advised by the defendant in July of 1972 that they were not hiring people with degrees in the laboratory at that time. She made a new application for employment in September of 1972. Thereafter she was advised by the defendant that she was over qualified for a lab job. In March of 1973 she made written inquiry about employment with the defendant and requested an application. The defendant forwarded an application to her but did not hear from her again. The laboratory technician jobs with the defendant involved routine analysis and testing. An employee with high school chemistry can adequately perform the job. Numerous blacks have been and are persently employed in these jobs. Experience has shown this defendant that an over qualified person in this job quickly becomes bored with the routine activity and becomes dissatisfied. Two former black employees of the defendant who worked in the lab testified that the job was routine and boring and could be adequately performed by someone with a high school chemistry background. One of these, Fred White, had left the defendant's employment to seek additional education as a chemical engineer. He testified that he was graduating in the near future and was being actively recruited by the defendant as a chemical engineer. Therefore, in view of

the number of blacks in various jobs in the laboratory as well as the number of blacks in other jobs with this defendant and the active minority recruitment activity of this defendant and the fact that plaintiff Caldwell was over qualified for a lab job, the Court finds there has been no racial discrimination by this defendant in not hiring this plaintiff.

22. *Ronald L. Coleman*—This named plaintiff's claim to fame in this litigation is that he, along with thousands of others, made application for employment; he is black, and was not employed; that in itself imposes a liability on the defendant. Contrary to plaintiff Coleman's contention, a company is not compelled to employ every job applicant just because he is a member of a minority group. The only requirement imposed on employers in which the defendant has in existence is a non-discriminatory employment procedure.

23. *Willie L. Jones*—The allegations of this plaintiff are three-fold: (1) He was harassed by his supervisor; (2) made to perform more work than white employees; and (c) denied off-duty educational assistance on account of his race. The "harassment" and "more work" theories are the result of plaintiff Jones being assigned duties within the function of his job, which he was paid to perform, and should have been performing. His direct refusal resulted in a five day suspension, after which his contention because the whites were not doing the details of the job, why should he. The Court does not believe Mr. Jones was required to perform more work than others, nor has he been harassed. In essence, the whole tenure of the evidence before the Court has been the militant belligerent attitude of certain blacks perpetrated by the

paternalistic attitude of the management at Union Carbide by permitting certain blacks to take advantage of all.

This Court would have readily sustained the discharge of Mr. Jones for this incident in question, if the company had so decided and consummated.

As for Mr. Jones' off-duty educational assistance claim, this is another absurdity. Mr. Jones worked shifts and desired to be given preferred treatment by being assigned to days; not be required to work overtime and thus placing job responsibility for his fair share of overtime on others; and be able to be absent from work when the work conflicted with school; and be paid for everything. A company is not required to "close its doors" in order to provide educational opportunities.

24. *Paul Richardson, Willie J. Mickles, Olney W. Lucious, III* and *Thomas S. Austin, Jr.* are contending they were denied promotions because of their race. It is their belief they were entitled to specific promotions because they were "more" qualified than the individuals who obtained the promotions, notwithstanding the facts those who received the promotions were qualified and had more seniority. It is the procedure of Union Carbide on promotions to obtain an input of names from all sources; analyze the qualifications of all, with qualifications being the primary factor. When more than one is qualified, seniority prevails. There was no showing this procedure is discriminating.

CONCLUSIONS OF LAW

1. Defendant's refusal to make changes in work schedules or overtime assignments to allow plaintiffs to participate in non-work activities was not racially motivated

nor did it constitute harassment. The "business necessity" criteria as announced in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, is only applicable if racial practices are employed. Absent proof of racial motivation, defendant is not bound by the business necessity criteria as mandated by Title VII of the Civil Rights Act of 1964.

2. Employment practices which perpetuate or tend to perpetuate past discrimination are forbidden by Title VII to the extent they are not supported by overriding legitimate, non-racial business necessity. Griggs v. Duke Power Co., 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158; Rowe v. General Motors Corp., (5th Cir. 1972), 457 F.2d 348. It is not enough under Title VII that the procedures utilized by employers are fair in form, they must be, in fact, fair in operation. Rowe v. General Motors Corp., supra. In this case defendant's procedures are both fair in form and fair in fact.

3. Statistical evidence in Title VII cases are given critical weight in this Circuit. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Johnson v. Goodyear Tire and Rubber Co., 491 F.2d 1364 at 1371-1373. Employment statistics produced by plaintiffs did not demonstrate a major disparity between employment and the available work force according to race, thus plaintiffs' evidence does not establish a prima facie case. United States v. Jacksonville Terminal Co., 451 F.2d 418 at 424-436.

4. The plaintiffs' evidence failed to prove their allegation that the company discriminated on racial grounds with respect to employment and promotion of supervisory

personnel. The plaintiffs here have not shown any instance of a qualified black who applied for and was rejected promotion to a supervisory position.

Input and participation of blacks in the selection of supervisory personnel (which occurred in this cause) was held to be essential to insure non-discriminatory action. Pettway v. American Cast Iron Pipe Co., supra.

5. The seniority system utilized by defendant is legal on its face and in practice and does not discriminate, Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969).

6. Title VII provides that the reinstatement of an employee may not be ordered when the discharge was for any reason besides prohibited discrimination.

Although it was certainly not necessary to have done so, Congress expressly provided in Title VII that:

> "No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a)."

The point of the matter is that an employee's race does not insulate him for discharge. Andres v. Southwestern Pipe, Inc., D.C., 321 F.Supp. 895, affirmed per curium, 446 F.2d 899 (5th Cir. 1971). In weighing the evidence in this matter neither members of the class nor individual plaintiffs were disciplined, harassed or discharged based

on racial grounds. There simply was no credible evidence in this case that any employee was harassed. In fact plaintiff Robinson's actions were tantamount to quitting his employment.

7. Title 42, U.S.C., Section 2000e-2(j) reads:

> "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in any apprenticeship or other training program, in comparison with the total number of percentage of persons of such race, color, religion, sex, or national origin in any community, State, section or other area, or in the available work force in any community, State, section, or other area."

This principle was definitely expressed by Chief Justice Burger in writing for the Court in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158. In a passage which the Fifth Circuit has referred to as "what may be the last word on this issue" United States v. Jacksonville Terminal Co., 451 F.2d 418, the Chief Justice stated:

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifi-

> cations. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." (401 U.S. at 430-431, 91 S.Ct. at 853).

To employ any group at a rate that greatly exceeds that group's composition of the work force in the community is to give discriminatory preference in violation of Title VII of the Civil Rights Act of 1964.

8. The Court must be skeptical when there exists a major disparity by race between the ratio of job applicants to any individual employer to that of the racial composition of the available work force in the community. The Court must suspect concerted effort when this major disparity exists.

9. An award of costs and attorneys' fees is discretionary with the Court. The Act provides that they may be awarded, 42 U.S.C., Section 2000e-5(g). The standards to be applied are set forth in Johnson v. Georgia Highway Express, Inc., 5 Cir., 488 F.2d 714. Plaintiffs are not entitled to an award of costs or attorneys' fees as they did not prevail in whole or in part, Miller v. Amusement Enterprises, 426 F.2d 534 (5th Cir. 1970).

JUDGMENT

In accordance with the Findings of Facts and Conclusions of Law entered by this Court in this cause on the 29th day of August, 1974, it is ordered, adjudged and decreed that judgment be entered for the defendant, Union Carbide Corporation. Costs are taxed to the plaintiffs.

APPENDIX B

(*Robinson* v. *Union Carbide*, Fifth Circuit No. 75-1008, September 10, 1976.)

Opinion of Court of Appeals

Before WISDOM and INGRAHAM, *Circuit Judges,* and GROOMS, *District Judge.*

INGRAHAM, *Circuit Judge:*

Nine blacks (appellants) filed a civil rights action against Union Carbide Corporation, charging it with various discriminatory employment practices perpetrated at the Chickasaw, Alabama plant. On appellants' motion the district court certified the case as a class action filed in behalf of:

> Those black job applicants who had an outstanding job application at the time of the commencement of this cause and those black job applicants who have filed job applications since the commencement of this cause and all future black job applicants, along with all current black employees of defendant Union Carbide Corporation, Materials System Division.

Additionally, the district court included a provision in its Notice of Pendency of Class Action which required potential class members to "opt-in" to preserve their back pay claims.[1]

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[1] The district court's Notice of Pendency of Class Action provided in part:

> If you are black and an employee or have an outstanding job application with defendant, . . . and desire other appropriate relief in addition to injunctive relief, you must notify the under-signed [district court] in writing . . . said notice to be postmarked or filed not later than February 20, 1974.

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After considering all the evidence, the district court concluded that Union Carbide's hiring and promotional practices were not discriminatory and did not violate Title VII of the Civil Rights Act.[2] On appeal appellants claim that

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[2] Appellants allege discriminatory employment practices in violation of civil rights laws, 42 U.S.C. § 1981 and 42 U.S.C. § 2000e. 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 2000e-2 provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> • • • • •
>
> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or

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the district court's ruling was clearly erroneous and that the order requiring class members to opt-in to obtain back pay is contrary to Rule 23 of the Federal Rules of Civil Procedure and Title VII of the Civil Rights Act.

Title VII Claims

1. *Hiring Practices*

In 1965 Union Carbide opened a plant in Mobile County, Alabama for the manufacture of "molecular sieves," a product that strains and filters liquid or gaseous molecules. The work force at the plant is composed primarily of residents in the vicinity of Mobile, Alabama, an area which is approximately 26% black. When the plant began operations, the work force consisted of 35 whites and 1 black. Nevertheless, within nine years the plant hired 84 black and 259 white employees. Furthermore, blacks serve in both salaried and wage-earning positions at the Union Carbide plant.[3]

> as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

[3] There are three categories of employees at the Union Carbide plant: (1) hourly wage personnel, (2) non-exempt salaried personnel, and (3) exempt salaried personnel. Within the ranks of the hourly wage personnel, employees work in the areas of production, warehousing and maintenance. The ranks of the non-exempt salaried personnel are composed of workers who are not exempt from the Fair Labor Standards Act and are entitled to overtime compensation. Essentially, non-exempt salaried employees are secretaries, technicians and service personnel. Exempt salaried employees are not protected by the Fair Labor Standards Act and are not entitled to overtime compensation. They fill supervisory positions such as foremen and superintendents.

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Union Carbide continually accepts employment applications irrespective of the existence of current vacancies. The personnel files keep a record of applicants; whenever a position becomes available, the applications from the "active" file are reviewed for employment consideration.[4] If

[4] Two personnel files are maintained. One is for "active" applicants; the other is for "inactive" applicants. The manager of personnel relations, James Garner, described the initial screening process whereby an applicant is placed in either the active or inactive file:

Q. Will you testify, please, what kind of factors you consider Mr. Krogen considers when he is making that decision [to classify an application "active" or "inactive"]?
A. First I would like to say that race is not on the application when we receive it.
Q. We understand that.
A. We don't know if it is black or white, or what the case may be. It does have male or female on the application. It does have the age and the date of the application. But when I review an application I just as a matter of routine go down the application because that's the way it was printed, and I don't look for any specific information. First I just go down to the date of it, whether the person is male or female, the weight, any physical limitations, if they know anybody at the plant, what job they are applying for, educational level, because that's next in line, and then the companies that they worked for, what kind of experience they had, how long they stayed on the job, were there any lapses of time. And then I turn it over to the rear to see the other experience that he or she had and the kind of work experience under clerical or production that they check off. And that's about it.
Q. Okay. Once a decision is made to put the application in the inactive file how long will your office retain that application form?
A. Two years.
Q. Just two years?
A. Yes sir.
Q. Now, if the application is put in the active file—First of all if it goes in the active file if the person is not hired as long as his application is in the active file and he is unsuccessful tell us exactly—

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the files contain an insufficient number of applications, Union Carbide places advertisements in the local newspaper. Then the plant conducts short screening interviews to determine the applicants' basic vocational interests and to answer any questions relating to the job openings. Following the initial interview, selected applicants are requested to return for an in-depth interview with three or four other plant employees—usually two engineers and one foreman. The applicant also tours the plant to view the working conditions. According to Mr. James W. Garner, manager of employee relations, the plant prefers applicants who are "more likely to be long term Carbide employees [and] who want the kind of work and opportunities that [the plant has] to offer." Three members of the personnel department discuss the qualifications of each applicant and decide which of the applicants are most qualified for, the

A. We haven't establish whether we are hiring or not hiring. Let's say we don't have an opening. You haven't hired the person because—
Q. Well, assume you hired him. Do you put his application somewhere else?
A. It goes in our employee records file.
Q. So regardless of the status of your hiring process, whether you are interviewing or whether there is vacancies or not, as long as an application is in the active file he is not yet hired?
A. That's correct.
Q. Now, you said that you sent some sort of notice to people who had their applications put in the inactive file. I am going to show you a couple of samples of the letters that you received from your files and ask you to identify for us what these various letters mean? You don't tell the person when you write him that your application has gone in the inactive file? You tell him something different?
A. They should get the idea that they are not being considered for employment.

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particular job opening. An offer is then extended to the candidates deemed to be most qualified.[5]

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[5] On direct examination counsel for the appellants attempts to establish the factors considered relevant to an employment decision:

Q. [W]hat are the factors that you consider most important in reaching your [employment] decision?
A. I am not sure I can answer that adequately. For instance, a person should not have had a criminal record. There are just so many factors I don't know if I could spell out or say that you do not use this factor or do use this factor. In personnel there are so many factors to use based on each individual's background and experience, and what they want, that I am not sure I can answer that in any meaningful way.
Q. It is always based on the background and the experience of the interviewer or evaluator—
A. That would leave that person to reach conclusion. Yes sir.
Q. So that you really couldn't identify them in concrete terms as if you were preparing an outline or guide of the hiring process?
A. I guess you could say that's true.
Q. Based on a whole lot of factors that sort of have been accumulated in your experience as a personnel officer over the years?
A. Yes sir.

The following testimony describing the attributes of a chemical operator sought to further define the general and perhaps abstract term "most qualified":

Q. What are the qualifications that the company requires of people who apply for or are considered for chemical operators or chemical operator trainees, since they have to go through it?
A. Well, physically they have to be able to perform the job, because the job is not one routine job. The jobs rotate, and on one side you might have 8 jobs or 10 jobs and on the other side 10 to 12 jobs and approximately every two weeks you rotate off that job to another job, and many of them are quite laborous tasks involved and takes a person with physical strength to move 300 pound drums or operate forklifts or lift 50 pound bags and things of this nature, so they have to have the physical qualifications to perform the jobs.

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Appellants claim that the Union Carbide hiring practices were discriminatory and violative of the Civil Rights

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Q. You don't have any absolute physical requirements in terms of weight or size or sex?
A. No sir.
Q. Is this a judgment call on the part of the people who are making the decisions?
A. Based on experience we know that a very tall and skinny person is going to have a time with drums and we know that a really short stocky person might have a difficult time raising heavy boxes and it would cause back strain and things like this. So it is just from experience.
Q. And you don't give them a medical examination and a physical test to see if they can lift something?
A. No.
Q. All right. What else beside physical qualifications do you require of a chemical operator?
A. They have to have a mental ability to be able to perform the tasks that are required, that are more complex, due to the technical nature of our plant, and because of the number of jobs they would be operating. And this you try to some extent to evaluate in an interview, and you can gather this from the past duties they performed on the job to some extent.
Q. Just the past duties they have had in other jobs, is that what you said, is the way you determine mental ability?
A. Well, from conversations and just an interviewing technique you try to determine if the person seems to have an aptitude that they could perform the functions.
Q. Does their formal education count for anything in that evaluation?
A. That's difficult to say because a person with a sixth grade education—we have evaluated scores of the chemical operator trainees, and a person with a sixth grade education might make more than somebody with two years of college, so it is difficult to look at the educational background and try to determine if they are going to make good or bad on it. So that's why we don't require a high school education.
Q. But you are not using the aptitude test anymore?
A. That's right.
Q. So it is just the interviewer's opinion based on a conversation?
A. Yes sir.

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Act, Title VII. Nevertheless, the employment practices of Union Carbide appear to be fair in form—that is, reason-

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Q. Besides the physical and mental abilities do you have any other kinds of qualifications that you can tell us about?

A. We would like the person to have a background that would indicate the person would be a stable, dependable employee, and one that would be with us a long time, because it takes quite a period of time to train this individual and we try to make this determination, if the person is going to be with us and be satisfied with a job over an extended period of time.

Q. How do you make decisions or conclusions about the stability of the person's background? Tell us how that is done.

A. We try to look at their employment history to determine how many jobs they had had in the past years; if they had any length of time that is unaccounted for, that you are not sure what the person did during that period of time. But their past experience is a good indication, I believe, of what they will do in the future.

Q. • • • [Y]ou did say you have no strict educational minimums such as a high school diploma?

A. That's correct.

Q. Do you have any age minimum?

A. Minimum? Well, because of the number of applicants we have who we can get that are mature people we don't hire very many people now around the age of 19. We prefer older people if we can find the people in our active files at that time that are older, more mature people that appear more safety conscious on the job.

Q. 19 years, as a general rule, is that cut off?

A. I guess you could make that general statement.

• • •

Q. Are there any particular kind of prior experience that the company favors towards applicants for chemical operator?

A. Well, of course, if I can find somebody with chemical operator experience—that's great. If you can find someone with industrial experience, someone that's been on the job several years, shown stability—that's good. But if you find a person that has been working with a service station or with a carpenter or with someone for a good

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ably directed to secure the best qualified candidate for the position available. Although perhaps fair in form, the hiring and promotional practices must also be fair in operation. In *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 355 (5th Cir. 1972), Chief Judge Brown stated:

> "It is clearly not enough under Title VII that the procedures utilized by employers are fair in form. These procedures must in fact be fair in operation. Likewise, the intent of employers who utilize such discriminatory procedures is not controlling since 'Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.' *Griggs* v. *Duke Power Co., supra,* 401 U.S. [424] at 432, 91 S.Ct. [849] at 854, 28 L.Ed.2d [158] at 165.

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number of years that showed stability you would consider these people also.

Q. Mr. Garner, why is prior industrial experience considered a desirable qualification?

A. Well, I guess about the same reason prior legal experience would be good for an attorney. It would require less training for that person who probably knows already what the job entails, and a clerical type person might get on the job and after six months say, "The job is not for me, it is too hard." So a person with industrial experience knows what the job calls for.

Q. • • • [W]hat about the factor of getting along with people well? Is that an important qualification for people applying at Carbide?

A. Yes sir. Very important.

Q. And how do you judge whether or not people get along well when they come through your hiring process?

A. Sometimes not very well. We will, of course, check references from previous employers. That's the best way to tell. Or if they know of people in the plant we can ask that person in their opinion what kind of record this person had, if they know them. We try to check references.

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> "It is therefore clear that employment practices which operate to discriminate against people because of their race, color, religion, sex or national origin, violate Title VII, even though the practices are fair on their face and even though the employer had no subjective intention to discriminate."

An examination of the consequences of Union Carbide's employment practices is thus critical to a disposition of this case.

The litigants proposed separate methods to analyze the hiring data. The appellants suggested that the total number of applications filed by black persons is the critical factor to be considered. Their statistical analysis showed that blacks filed approximately 50% of all applications but secured only 26% of new hourly positions:

	Hirees		*Applicants*	
Year	*Black*	*White*	*Black*	*White*
1971	10	7	572	587
1972	25	48	1177	1071
1973	19	68	1114	1018
Total	54	123	2863	2676

At least one witness, however, cast suspicion on the reliability of appellants' approach, comparing it to "trying to measure jellyfish with a rubber band [because] you don't know where all the applicants come from . . . [and] how many are duplicated. [S]ome applicants fill six applications a year out. We have even had three or four in one month from a particular applicant."

Union Carbide, offering an alternative method of analysis, urged that the employment record should be pro-

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portionate to the composition of the local work force. Since 1970 approximately 33% of all employees hired by Union Carbide have been black. Operating its plant in an area where the labor force is approximately 26% black, Union Carbide presents convincing statistics tending to negate the existence of a discriminatory effect of its hiring practices and procedure:

	Hirees		
Year	*Blacks*	*Whites*	*% Black*
1965-1969	37	166	18%
1970	5	9	35%
1971	10	7	58%
1972	25	48	34%
1973	19	68	21%
Total	96	298	24%

Adopting Union Carbide's method of analysis, the district court concluded that the employer ". . . has truly equal access to jobs at its Chickasaw plant by blacks and whites and the Court finds that this has in fact produced an employee population with substantially the same proportion of blacks represented as are in the Mobile area work force." The district court's recognition of the employer's method of analysis as more reliable and indicative of racial discrimination is supported by testimony that appellants' alternative analysis is subject to suspect data, such as the duplication of employment applications. Additionally, the trial court's finding that Union Carbide's method is more reliable is supported by the practice of other federal courts. On many occasions federal courts have compared the composition of the company's work force to the composition of the labor force in the surround-

ing area. *E.g., Jones* v. *Tri-County Elec. Cooperative, Inc.*, 512 F.2d 1 (5th Cir. 1975); *Morrow* v. *Crisler*, 479 F.2d 960 (5th Cir. 1973), *rehearing*, 491 F.2d 1053, *cert. denied*, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139 (1974); *NAACP* v. *Beecher*, 371 F.Supp. 507, 515 (D.Mass.Mod.) *aff'd* 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775; *Crockett* v. *Green*, 388 F.Supp. 912, 917 (E.D.Wis. 1975); *Fowler* v. *Schwartzwalder*, 351 F.Supp. 721 (D.Minn. 1972).

Under the standard of review in this circuit there must be "requisite subsidiary facts to undergird the ultimate facts." *Causey* v. *Ford Motor Co.*, 516 F.2d 416, 420-21 (5th Cir. 1975). We conclude that the record presents sufficient underpinnings to support the ultimate finding that Union Carbide did not engage in discriminatory hiring practices.

2. *Promotional Practices*

Even an employer who exhibits nondiscriminatory hiring practices can fall short in its system of promotion, *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 355-59 (5th Cir. 1972) (Brown, *C.J.*), and that appears to be the situation in the instant case. Although the employer's affirmative action hiring program has resulted in the employment of blacks in close proportion to the composition of the area labor force, the system of promotion has failed to provide equal access to the most preferred positions at the Chickasaw plant. For this reason we REVERSE and REMAND on the issue of Union Carbide's promotional practices.

(a) *System of promotion.* The plant uses a seniority system to promote employees within the rank of "hourly personnel." When there is an hourly position available, current employees can bid for the job. The senior employee

satisfying the minimum qualifications for the position will secure the job. According to Mr. Garner, "[the plant] can't hire anybody outside the plant who makes a high test score or promote a person to that job who makes a higher test score. . . . [W]e promote the most senior qualified employees." Job candidates demonstrate that they are *qualified* by passing the examinations prepared and administered by the Employee Relations Manager and a plant foreman or supervisor.[6] The plant provides training programs designed to prepare employees for the exams, the passing of which is essential to secure a better hourly wage position. Thus, assuming the requisite seniority, completion of a training program and passing the company's exam are the keys to advancement within the hourly ranks.

In the case of "non-exempt salaried personnel"[7] the system of promotion is somewhat different. The personnel department posts a notice of the particular job opening and accepts applications for the position. After the initial screening process, applicants are referred to the department supervisor under whose direction the selected applicant would work. The ultimate employment decision is made by the responsible department supervisor, with personnel's concurrence.

A third category, "exempt salaried employees,"[8] is not derived from job posting or seniority bidding, but is the product of Carbide recruitment. Chemical engineers and other technical and supervisory personnel, for example, are

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[6] The qualification test must be "job related" or designed to reliably predict whether the applicant possesses the reasonably necessary job skills. *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973).

[7] See n. 3.

[8] See n. 3.

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exempt salaried employees. To fill the engineering positions Carbide representatives approach the colleges and universities to conduct job interviews. When the plant hires new foremen, the superintendents and supervisors evaluate all employees in the particular division and select the the most qualified individuals for advancement from the hourly wage to salaried positions. The ultimate decision, however, is not based on uniform procedures or objective standards. Instead, the selection of one candidate over another depends on highly subjective criteria which shift in importance from case to case.

(b) *Statistical evidence of racial discrimination.* As mentioned earlier, the original work force at the Chickasaw plant was composed of 35 whites and 1 black. Six of the 36 whites are presently employed by Union Carbide; one is plant manager, one is an area supervisor, two are first line supervisors, and two are group leaders. Only the plant manager began his employment in that capacity; the other five white Carbide employees began in low priority wage-earning positions but were promoted through successive promotions. In contract, the first black employee began as an oiler and is currently a warehouseman; both jobs are low priority wage-earning positions.

Blacks continue to dominate the ranks of menial employment at Union Carbide's plant in grossly disproportionate numbers. For example, 40% of the oiler and helper-trade employees are black; blacks constitute only 19.2% of the total work force. Only 7.1% of the plant's maintenance department is black, exclusive of members of the oiler/helper trades.

The following charts demonstrate that blacks occupy a severely disproportionate number of the low-priority, non-salaried positions:

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	Starting Hourly Wage	White	Black	Total	% Black of Total
MAINTENANCE					
Group Leader Maintenance	$4.97	3	0	3	0%
Group Leader Electrical	$4.97	1	0	1	0%
Electrician "A"/ Maint. Mach.	$4.61	16	2	18	11.1%
Utility Maint. Man-Electrician "C"	$3.79	4	0	4	0%
Oiler	$3.63	0	3	3	100%
Helper-Trades	$3.46	9	3	12	25%
Maintenance Mech.Trainee	$3.58	2	0	2	0%
Sub Total		35	8	43	18.6%
PRODUCTION					
Senior Chemical Operator	$4.36	12	0	12	0%
Chemical Operator	$4.02	75	34	109	31.2%
Chemical Operator Trainee	$3.58	3	2	5	40%
Sub Total		90	36	126	28.5%
WAREHOUSE					
Warehouseman	$4.16	3	2	5	40%
Grand Total		128	46	174	26.4%

	July '65			July '70			July '72			April 1973		
	White	Black	% Black of Total	White	Black	%Black of Total	White	Black	%Black of Total	White	Black	%Black of Total
PRODUCTION	18	0	0%	71	20	21.9%	67	26	27.9%	90	36	28.6%
MAINTENANCE	6	1	14%	23	7	23%	24	11	31.4%	35	8	18.6%
WAREHOUSE	0	0	-	3	2	40%	3	1	25%	3	2	40%
SERVICE	11	0	0%	92	9	8.9%	105	12	10.2%	115	12	9.4%
TOTAL:	35	1	2.7%	189	38	16.7%	197	52	20.8%	243	58	19.2%

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A substantial disparity between the proportion of blacks in a specific job classification is sufficient to establish a prima facie case of employment discrimination. *E.g., Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721, 729-30 (5th Cir. 1976); *Wade* v. *Mississippi Cooperative Extension Service*, 528 F.2d 508, 516-18 (5th Cir. 1976); *United States* v. *T. I. M. E.-D. C., Inc.*, 517 F.2d 299, 311-14 (5th Cir. 1975); *cert. granted*, —— U.S. ——, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976); *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 358 (5th Cir. 1972). The contrast between the black population of the Mobile area (approximately 28%) and the percentage of blacks in supervisory or salaried positions (below 10%) constitutes a substantial statistical discrepancy and, thus, establishes a prima facie case of unlawful racial discrimination. After the prima facie case is established, the burden of persuasion shifts to the corporation whereby it must show the statistical discrepancy results from causes other than racial discrimination. *Sagers* v. *Yellow Freight System, Inc., supra; Wade* v. *Mississippi Cooperative Extension Service, supra.*

(c) *Response to a prima facie case of discrimination.* Union Carbide contends that the employment statistics are the result of a nondiscriminatory system of promotion. For promotion within the hourly wage category, the employer relies on ostensibly nondiscriminatory data—the candidates' seniority and the successful completion of comprehensive tests designed and administered by the employer. In this employment category, we conclude that the district court's non-discrimination finding has inadequate factual underpinning in the record and should be REVERSED.

Union Carbide failed to establish that the qualification exams were "job related;" that is, there must be a correlation between test scores and actual job performance, *Crockett* v. *Green*, 388 F.Supp. 912, 919-20 (E.D.Wis. 1975). Additionally, the employer failed to show that the admission standards for its training program were objective and nondiscriminatory. Because the training programs are a springboard to occupational advancement, the admission standards are clearly relevant to an analysis of the plant's promotional practices.

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Promotion within the ranks of salaried personnel is based upon the supervisors' subjective evaluation of a job candidate, without definite qualification factors being considered in a fixed ratio. Mr. Garner described the basic process for promoting an hourly wage earner to a salaried supervisory position:

> Q Mr. Garner, would you please describe the process of selecting first line maintenance and production supervisors?
>
> A When there is a vacancy, an increased need for a first line supervisor in production, the positions are first approved by top management, who in this case would be the Plant Manager . . . . [Then the responsible Production Superintendent requests] his Area Supervisor to evaluate our employees for this position.
>
> And the Area Foreman sends out memos, or by any means, ask Foreman and Employee Relations Departments, Superintendents and general management to recommend anyone they feel would be qualified for the position. Evaluations are made . . . [by] anyone who had the opportunity to evaluate their performance in a Temporary Foreman's job or in a work capacity that they were being considered for.

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These evaluations and reports are turned in to the Production Superintendent and in group meetings, we discuss applicants—applicants meaning from within the company at this time, we used to go outside—and a group decision is reached on who would be the best canidate for the position. At times, depending on the circumstances, we might choose to have a period of time of several months to try out Temporary Foremen who have not tried out before; or it might be the case that we have already have done this as the year went along and that might not be necessary.

But, after the *compilation of all of the results of the questionnaires or comments and evaluations,* then a group decision is made of who is going to be offered that job. That person is then interviewed, it could be by more than one person, by four managers—myself, the Plant Manager, the Engineering and Construction Manager and Mr. Portzer, our Production Manager. And if all agree that that is the right person for the right job at that time, an offer is made to that individual.

Q Then the final decision is made by no one particular person?

A That is correct.

The questionnaires and evaluation forms used by Union Carbide require the interviewer's subjective opinion concerning the candidates' "adaptability," "bearing, demeanor, manner," "verbal expression," "appearance," "maturity," "drive," and "social behavior." Such high-level subjectivity subjects the ultimate promotion decision to the intolerable occurrence of conscious or unconscious prejudice. *Rowe*

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v. *General Motors Corp., supra,* at 358-59; *Wade* v. *Mississippi Cooperative Extension Service, supra,* at 517-18.

(d) *Conclusion.* In *Wade,* this court noted that the employer's evaluation form was constitutionally defective under *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) in three respects:

(1) "the questions on the evaluation form were in part subjective and vulnerable to either conscious or unconscious discrimination by the evaluating supervisors;"

(2) "the evaluation scores themselves were not consistently used as a basis for . . . promotion;" and,

(3) "the defendants wholly failed to make a showing that the test was substantially related to the particular job of the individual being evaluated." 528 F.2d 508, 518.

Similarly, in *Rowe* this court suggested several other conditions reflecting Title VII violations:

(1) "[t]he foreman's recommendation is the indispensable single most important factor in the promotion process, [but he is] given no written instructions pertaining to the qualifications necessary for promotion;"

(2) "standards which were determined to be controlling are vague and subjective;"

(3) "[h]ourly employees are not notified of promotion opportunities nor are they notified of the qualifications necessary to get the job;" and,

(4) "there are no safeguards in the procedure designed to avert discriminatory practices." 457 F.2d 348, 358-59.

In regard to Union Carbide's promotion practices in the ranks of salaried personnel, we also conclude that the trial court's no discrimination finding lacked adequate factual support in the record. Therefore, under our standard of review, we REVERSE and REMAND the district court's findings and conclusions regarding Union Carbide's system of promoting employees in the ranks of the hourly wage and salaried personnel. *Causey* v. *Ford Motor Co.*, 516 F.2d 416, 420-21 (5th Cir. 1975). The employer clearly failed to rebut the statistics or to explain the disparity in promotion.

CLASS ACTION CLAIM

Appellants argue that the trial court's "opt-in" notice violates the "opt-out" notice provisions of Rule 23(c)(2).[9] Indeed, Rule 23(c)(2) provides for mandatory notice to (b)(3)-type[10] class members whereby each has a right

[9] Rule 23(c)(2) provides:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not require exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

Fed.R.Civ.P. 23(c)(2).

[10] Rule 23(b)(3) provides:

> An action may be maintained as a class action if . . . the court finds that the questions of law or fact common to the members

to exclude himself, or opt out of the class. Concerning this opt out option under Rule 23(c)(2), one commentator pointed out that the provision was patterned after the highly successful procedure of the Book-of-the-Month Club. Frankel, "Some Preliminary Observations Concerning Civil Rule 23," 43 F.R.D. 39, 44 (1967). The rule was designed to prevent "sideline sitting" and subsequent "one-way intervention" by the eligible class member. *Compare, Escott* v. *Barchris Const. Corp.*, 340 F.2d 731, 735-36 (2nd Cir. 1965) (Friendly, J., concurring).

Appellants' claim essentially contests the second portion of the district court's "Notice of Pendency of Class Action" requiring class members to opt in to obtain back pay.[11]

> of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
>
> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3).

[11] The first portion of the district court's notice of January 7, 1974 provides:

> You are hereby notified that Freddie D. Robinson and others have pending a legal action in the United States District Court for the Southern District of Alabama on behalf of all black job applicants and black employees of Union Carbide Corporation, Materials Systems Division.
>
> The Court has by Order found and determined that this action is to be maintained as a class action for the benefit of the class.

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The supplemental notice to class members that do not opt out under the first portion of the Notice is permissible as requiring "some affirmative action as a condition of ultimate recovery." 3B Moore's Federal Practice ¶ 23.55 at 23-1161 (1975); *Iowa* v. *Union Asphalt & Roadoils, Inc.*, 281 F.Supp. 391, 404 (S.D.Iowa 1968); *Philadelphia Elec. Co.* v. *Aanaconda Am. Brass Co.*, 43 F.R.D. 452, 459 (E.D. Pa. 1968); *Harris* v. *Jones*, 41 F.R.D. 70, 74-75 (D.Utah 1966).

The basis of liability claimed against the defendant is the alleged violations of federal fair employment laws.

The defendant has denied liability.

If you are black and are either an employee or have been an employee or have an outstanding job application with the defendant, Union Carbide Corporation, Materials Systems Division, you will be included in such class for injunctive relief purposes; it is not necessary for you to contact the Court pertaining to injunctive relief sought and any judgment will be binding upon you; however, if you wish to participate in this part of the litigation you have a right so to do and if you so elect you must notify the Clerk of the Court of your election by *February 20th*, 1974.

The supplemental provision provides:

If you are black and an employee or have an outstanding job application with defendant, Union Carbide Corporation, Materials Systems Division, and desire other appropriate relief in addition to the injunctive relief, you must notify the undersigned in writing at Post Office Box 1964, Mobile, Alabama, 36601, or at the United States Court House, Clerk's Office, Mobile, Alabama, and said notice to be postmarked or filed not later than *Fabruary 20th*, 1974. If you desire to be included in the class for any such other appropriate relief and notify the undersigned or the Court of the same, you will be notified when the case is set on the merits, at which time you must appear and prove your claim in accordance with the law and be prepared to prove what efforts you have taken to mitigate your damages, if any.

A hearing is scheduled for 9:00 a. m. on *February 15th*, 1974 in Room 229, United States Court House, Mobile, Alabama to which you are invited to attend and at which meeting you may ask questions and receive answers as to your rights and responsibilities. As you will note, this meeting is scheduled prior to the time you must make your election.

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Thus, assuming the sufficiency of the first section of the Notice, the district court did not err by requiring the affirmative action in the second section as a condition of ultimate recovery.

We AFFIRM this part of the district court's judgment.

CONCLUSION

We AFFIRM the district court on the class action and hiring practices issues; REVERSE and REMAND on the no discrimination findings as to Union Carbide's system of promotion.

APPENDIX C

(*Robinson* v. *Union Carbide*, Fifth Circuit No. 75-1008, On Petition for Rehearing and Petition for Rehearing En Banc. ~~September~~ Summary 10, 1976.)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion September 10, 1976, 5 Cir. 1976, 538 F.2d 652.)

Before WISDOM and INGRAHAM, *Circuit Judges*, and GROOMS, *District Judge*.

INGRAHAM, *Circuit Judge:*

The original opinion is modified by withdrawing the language following the first sentence under the section entitled "Class Action Claim" found on page 662 and continuing to the end of the opinion, substituting the following therefor.

We preface this discussion by noting that the action probably should have proceeded under Rule 23(b)(2) rather than 23(b)(3).[10] The former compels inclusion and therefore promotes judicial economy, consistency of result, and binding adjudication more effectively than 23(b)(3). *Mungin* v. *Florida East Coast Ry. Co.*, 318 F.Supp. 720, 730 (M.D.Fla. 1970), *aff'd* per curiam, 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 897, 92 S.Ct. 203, 30 L.Ed.2d 175 (1971). *See also Bing* v. *Roadway Express, Inc.*, 485 F.2d 441, 447 (5th Cir. 1973). However, (b)(3) type actions do bind all persons who do not opt out of the action. Fed.R. Civ.P. 23(c)(2). Rule 23 does not require notice for (b)(2) type actions. *Wetzel* v. *Liberty Mut. Ins. Co.*, 508 F.2d 239, 254-57 (3rd Cir. 1975). Rule 23(c)(2) provides for mandatory notice to class members in (b)(3) type actions, whereby each has a right to exclude himself, or opt out of, the class. This "Book-of-the-Month Club"[11] approach prevents "sideline sitting" by eligible class members. *Compare Escott* v. *Barchris Construction Corp.*, 340 F.2d 731, 735-36 (2nd Cir. 1965) (Friendly, J., concurring).

Appellants' attack is directed at the supplemental provision of the district court's "Notice of Pendency of Class Action" requiring class members to opt in to obtain back pay.[12] The district court undoubtedly realized that there

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[10] Rule 23(b)(2) and (b)(3) provide:

> An action may be maintained as a class action if
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

[11] *See* Frankel, "Some Preliminary Observations Concerning Civil Rule 23," 43 F.R.D. 39, 44 (1967).

[12] The first portion of the district court's notice provides:

> You are hereby notified that Freddie D. Robinson and others have pending a legal action in the United States District Court for the Southern District of Alabama on behalf of all black job applicants and black employees of Union Carbide Corporation, Materials Systems Division.

are some class actions where it is necessary for class members who do not opt out "to take some affirmative action as a condition of ultimate recovery." 3B Moore's Federal Practice ¶ 23.55 at 23-1161 (1975). The key word here is "ultimate." This has particular relevance to Title VII

The Court has by Order found and determined that this action is to be maintained as a class action for the benefit of the class.

The basis of liability claimed against the defendant is the alleged violations of federal fair employment laws.

The defendant has denied liability.

If you are black and are either an employee or have been an employee or have an outstanding job application with the defendant, Union Carbide Corporation, Materials Systems Division, you will be included in such class for injunctive relief purposes; it is not necessary for you to contact the Court pertaining to injunctive relief sought and any judgment will be binding upon you; however, if you wish to participate in this part of the litigation you have a right so to do and if you so elect you must notify the Clerk of the Court of your election by *February 20th*, 1974.

The supplemental provision provides:

If you are black and an employee or have an outstanding job application with defendant, Union Carbide Corporation, Materials Systems Division, and desire other appropriate relief in addition to the injunctive relief, you must notify the undersigned in writing at Post Office Box 1964, Mobile, Alabama, 36601, or at the United States Court House, Clerk's Office, Mobile, Alabama, and said notice to be postmarked or filed not later than *February 20th*, 1974. If you desire to be included in the class for any such other appropriate relief and notify the undersigned or the Court of the same, you will be notified when the case is set on the merits at which time you must appear and prove your claim in accordance with the law and be prepared to prove what efforts you have taken to mitigate your damages, if any.

A hearing is schedule for 9:00 a. m. on *February 15th*, 1974 in Room 229, United States Court House, Mobile, Alabama to which you are invited to attend and at which meeting you may ask questions and record answers as to your rights and responsibilities. As you will note, this meeting is scheduled prior to the time you must make your election.

actions, wherein a bifurcated procedure is utilized to determine, first, liability and then relief. *Swint* v. *Pullman-Standard*, 539 F.2d 77, 94 (5th Cir. 1976); *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721, 733-34 (5th Cir. 1976); *Baxter* v. *Savannah Sugar Ref. Corp.*, 495 F.2d 437, 443-44 (5th Cir. 1974). Although there may be some Title VII actions in which unnamed individual plaintiffs will have to come forward to establish their entitlement to portions of the recovery, such requirement should not be imposed upon them until *necessary* for adjudication. In this case, coming forward to establish an entitlement was futile in light of the initial determination by the district court that that defendant was not liable. Opting in was not necessary before the determination of liability. The district court apparently relied upon the language of 23(d)(2)[13] for its opt-in requirement. Although 23(d)(2) might be read to impinge upon the preceding subsections of Rule 23, we cannot believe that it was intended to negate the clear trust of the rule which is to minimize the requirement of active intervention by numerous members of an affected class.

Upon remand, the court should consider the claims of those members who would have been excluded by their earlier failure to opt in for back pay purposes. It may be

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[13] Rule 23(d)(2) provides:

In the conduct of actions to which this rule applies, the court may make appropriate orders . . .

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

necessary to obtain some affirmative action before the final determination of appropriate relief. While not necessarily erroneous, the language of the supplemental provision is not especially informative as to what relief was available to the class members. The district court should inform class members that back pay is included among possible types of relief.

We REVERSE this part of the district court's judgment.

CONCLUSION

We AFFIRM the district court on the hiring practices issue: we REVERSE and REMAND on the no-discrimination findings as to Union Carbide's system of promotion and on the class action issue.

WISDOM, *Circuit Judge* (concurring specially):

After further consideration of *Robinson* v. *Union Carbide Co.*, No. 75-1008, September 10, 1976, the Court has withdrawn the section of its opinion entitled "Class Action Claim" and has substituted a new opinion. Because the majority opinion restricts too narrowly the discretion of district courts to gather information in class action suits, I file this special concurrence.

The plaintiffs-appellants brought a class action job discrimination case against the company's Materials Systems Division. The district court held that neither the hiring policies nor the job promotion practices of the division violated the Civil Rights Acts. We affirm the holding about hiring but reversed that portion of the holding relating to job promotions, because the company has not satisfactorily rebutted the plaintiffs' statistical showing of racial discrimination.

The plaintiffs based their appeal, in part, on notice sent to the members of the class by the district court at the outset of the suit:

> If you are black and an employee or have an outstanding job application with defendant . . . and desire other appropriate relief in addition to injunctive relief, you must notify the undersigned in writing . . . . If you desire to be included in the class for any such other appropriate relief and notify the undersigned or the Court of the same, you will be notified when the case is set on the merits, at which time you must appear and prove your claim in accordance with the law and be prepared to prove what efforts you have taken to mitigate your damages, if any.

The workers argue that this notice violates the opt-out provisions of Rule 23(c)(2) of the Federal Rules of Civil Procedure[1] because it requires class members to take affirmative action to secure back pay or other damages. At first glance, the unfortunate wording of the supplemental notice provision appears to require members to take affirmative action to join the class. If the notice actually constituted an opt-in order, it would clearly violate Rule 23. *See* Ten-

[1] Rule 23(c) states in part:

> (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

tative Draft, *Manual for Complex Litigation* 72-74 (fourth revision, July 21, 1976). Closer analysis of both the supplemental and primary notices reveals, however, that they do not require the plaintiffs to opt into the class action in violation of the Rule. As a result, I cannot accept the plaintiffs' objection to the notices, although I would remand them for further action by the district court on other grounds.

Rule 23, as amended in 1966, requires the trial court in a class action to issue an "opt-out" notice informing class members that they will be bound by the law suit unless they notify the court of their intention not to be bound. If they so notify the district judge, the judgment in the class action will neither affect them nor prevent them from filing a later suit on the same matter. The authors of the Rule preferred this approach over an "opt-in" procedure whereby members of the class would notify the district court if they desired inclusion in the suit. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv.L.Rev. 356, 397 (1967). The amendment therefore prevents potential class members from delaying their decision about whether to join the action until the case reaches judgment. Such "sideline sitting" would enable them to receive the benefits of a judgment in their favor and to avoid the res judicata effect of a decision against their interests. 3B Moore's Federal Practice ¶ 23.55 at 23-1160 (1975). Now, they will be bound unless they "opt-out" at an early stage of the litigation.

The supplemental notice in this case does not violate the amendment to Rule 23(c)(2) because it does not require members to opt-into the class action in order to be bound

by it. As the trial court explained in its primary notice,[2] the class members were bound unless they notified the court of their desire to be excluded. The supplemental notice, directed only to those members who had not excluded themselves, merely conditioned the receipt on the submission and proof of the claim for such relief. If the members had not submitted their claims, they could not have brought other suits because, under the court's primary notice, the class action had res judicata effect upon all claims arising from the alleged job discrimination. Consequently, the two notices prevented sideline sitting and did not violate Rule 23(c)(2).

Correctly analyzed, the supplemental notice in *Robinson* arises from Rule 23(d)(2),[3] not (c)(2). Because the au-

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[2] The first portion of the district court's notice of January 7, 1974 states in part:

> You are hereby notified that Freddie D. Robinson and others have pending a legal action in the United States District Court for the Southern District of Alabama on behalf of all black job applicants and black employees of Union Carbide Corporation, Materials Systems Division . . .
>
> The Court has by Order found and determined that this action is to be maintained as a class action for the benefit of the class.
>
> • • •
>
> If you are black and are either an employee or have been an employee or have an outstanding job application with the defendant, Union Carbide Corporation, Materials Systems Division, you will be included in such class for injunctive relief purposes, it is not necessary for you to contact the Court pertaining to injunctive relief sought and any judgment will be binding upon you; however, if you wish to participate in this part of the litigation you have a right so to do and if you so elect you must notify the Clerk of the Court of your election by *February 20th*, 1974.

[3] Rule 23(d) states in part:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for

thority to issue such notices is discretionary rather than mandatory, the question is whether the district court abused its discretion by issuing a supplemental notice that conditioned damage recovery on certain affirmative action by class members. I would hold that an abuse occurred because the notice burdens too severely the right of small claimants to benefit from the class action.

The class action device enables small claimants, who could not afford to bring individual law suits, to vindicate their common rights. *Hawaii* v. *Standard Oil Co.*, 1972, 405 U.S. 251, 265-66, 92 S.Ct. 885, 31 L.Ed.2d 184; *Korn* v. *Franchard Corp.*, S.D.N.Y. 1970, 50 F.R.D. 57, 58, *rev'd on other grounds*, 2 Cir. 1972, 456 F.2d 1206; *cf. Rothman* v. *Gould*, S.D.N.Y. 1971, 52 F.R.D. 494, 496. This overriding policy supports the "opt-out" approach of the 1966 amendments. As Professor Kaplan has argued:

> [R]equiring individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable. . . . Its seems fair for the silent to be considered as part of the class.

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the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; . . .

Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 1967, 81 Harv.L.Rev. 356, 397-98.

Despite the strength of this policy, district courts have consistently tempered it with the recognition that damage remedies, even in class actions, should respond to harm actually suffered by class members. In a securities case the purchaser of ten shares may deserve twice the recovery of the purchaser of five shares. Similarly, in a job discrimination action, a worker unjustifiably denied three promotions may deserve more back pay than another worker denied only one advancement. To effect such remedies, then, courts must request class members to explain the facts of their various claims. *See, e.g., Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, E.D.Pa. 1968, 43 F.R.D. 452, 459; *Harris* v. *Jones*, D.Utah 1966, 41 F.R.D. 70, 74. Furthermore, early discovery of the extent and type of claims can expedite substantially the management of a class action. For instance, in *Arey* v. *Providence Hospital*, D.D.C.1972, 55 F.R.D. 62, the court requested early feedback from class members in an employment discrimination suit. Judge Flannery thought the information:

> would be instructive and aid the court by providing information as to the scope of the class and the scope and diversity of discrimination claims, thereby allowing the court to rule more intelligently in future determinations regarding the boundaries of the class, the need for sub-classes, or even a re-evaluation of the class status designation itself. In the court's mind, the fact that this action is brought under Title VII and involves individual rights championed in the pub-

lic interest is supportive of the court's desire for as much information as possible before making rulings affecting these rights.

Early identification of this information will also encourage accurate settlement discussions.

The task facing district judges as they promulgate 23(d)(2) notices is to reconcile the conflicting policies. Although the decision-making must proceed case by case, a few general observations can help guide the exercise of district court discretion. First, proper management of class actions requires that district judges be granted the authority under Rule 23(d)(2) to request class members to file statements of their claims. *Knight* v. *Board of Education,* S.D.N.Y.1969, 48 F.R.D. 108, 112-14; *Iowa* v. *Union Asphalt & Roadoils, Inc.,* S.D.Iowa 1968, 281 F. Supp. 391, 403-04; *Harris* v. *Jones,* D.Utah 1966, 41 F.R.D. 70, 74. Second, because this information can assist district courts as they structure sub-classes, reexamine class designations, or promote prompt settlements and other dispositions, district judges should be able to request that class members respond to supplemental notices at early stages of litigation.[4] *Arey* v. *Providence Hospital,* D.D.C.

[4] In an amicus brief the Equal Employment Opportunity Commission argues that "no purpose whatsoever is served by requiring class members to present back pay claims prior to a determination as to liability" of the defendant. As Judge Flannery explained in *Arey* v. *Providence Hospital,* D.D.C. 1972, 55 F.R.D. 62, however, several benefits can accrue from early statement of claims. By forbidding early requests for such statements, we would deny district courts the discretion to collect claim information that could assist in management of the class, definition of sub-classes, promotion of settlements, or re-evaluation of the class designation itself. Consequently, we cannot hold as a matter of law that a

1972, 55 F.R.D. 62, 71-72. Third, the courts, when necessary, should be able to enforce their requests for information by limiting recovery to those who respond. *Korn*

district judge necessarily abuses his discretion by requiring the statement of claims prior to the imposition of liability.

Several district courts in the exercise of their discretion, have declined to require early claim statements. *See, e.g., Byrnes* v. *IDS Realty Trust,* D.Minn. 1976, 70 F.R.D. 608, 614; *B & B Investment Club* v. *Kleinert's Inc.,* E.D. Pa. 1974, 62 F.R.D. 140, 145-51; *Sirota* v. *Econo-Car International, Inc.,* S.D.N.Y. 1974, 61 F.R.D. 604, 607-08. Our holding would not preclude such judgments. But these cases do not provide the grounds for holding a contrary decision necessarily to be an abuse of discretion. *B & B Investment Club,* for instance, holds that as a matter of fact the potential benefits of requiring early claim statements do not outweigh the potential detriments. Because such factual determinations will vary from case to case, district courts should have the discretion to weigh the merits of each situation. Furthermore, the potential detriment underlying the *B & B* decision rests on the dubious assumption that small claimants will more likely take affirmative action to state their claims after, rather than before, the decision on liability. Before this assumption could provide the basis for a legal decision precluding all requests for early claim statements, substantial empirical evidence would have to support it. Presently, no empirical data exist on the topic.

The EEOC also submits that requiring early claim statements violates Title VII principles. First, it argues that *Albemarle Paper Co.* v. *Moody,* 1975, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280, prohibits district courts from conditioning recovery of back pay on early statements of claims. *Moody* held that a district court could not deny back pay to an entire class of plaintiffs without a compelling justification. The Supreme Court found that "good faith" conduct by an employer could not justify such a denial. But the Court also found that delay in the request for back pay by a plaintiff class could justify a denial. If delay can become a "compelling justification," then a total failure to provide the district court with a basis upon which to manage the class action and to compute damages should also provide the justification. Furthermore, the Supreme Court granted the district courts broad discretion to make such determinations. Appellate courts were instructed to reverse only clearly erroneous decisions. Consequently, *Moody* supports our refusal to limit the discretion of the district courts.

v. *Franchard Corp.*, 2 Cir. 1972, 456 F.2d 1206, 1210-11, illustrates the problems created by optional claim statements. So few class members in this securities case responded to the request for information that the defendants moved to dissolve the class. Although the district court wisely denied the motion, the valid purposes for which it issued the supplemental notice could hardly have been attained when 75 percent of the class failed to return the questionnaire and another 15 percent did not answer it completely. *Id.; Korn* v. *Franchard Corp.*, S.D.N.Y. 1970, 50 F.R.D. 57, 58-59. Consequently, we cannot say as a general rule that enforcement of claim statement requests necessarily exceeds the discretion granted district judges under Rule 23(d)(2). A court may decide that enforcement is not needed in various cases or stages of litigation. *Arey* v. *Providence Hospital*, D.D.C.1972, 55 F.R.D. 62, 72. But given the substantial need for accurate information about claims, district courts should retain discretionary enforcement authority.

Because of the basic purpose of the class action, however, district courts cannot exercise unlimited discretion to issue (d)(2) notices. The judiciary must always be sensitive to the need of citizens to protect their common rights while avoiding the expense and procedural burdens of major litigation. To protect this interest, courts should not issue (d)(2) notices that require complicated legal responses. First, notices should not place the burden on class members to discover what remedies might be available to them. Open ended requests for them to come forward and make their cases would require class members to seek legal advice, a substantial financial burden, to discover whether they had cases to advance. The court itself should set forth the alternatives, as well as any other points

of law necessary to understand the notice. Second, the court should limit the required responses by class members to factual matters that laymen can easily supply. *See Knight* v. *Board of Education*, S.D.N.Y. 1969, 48 F.R.D. 108, 113 (a sample questionnaire). Third, the court should provide the easiest means practicable for the members to register their responses. Requiring personal appearances, at least at early stages of the litigation, would generally impose too great a burden, especially where written responses would suffice. In addition, any requests for writings should include, whenever possible, a form that the members can easily fill out and return. By instituting such precautions, the district judge can satisfy both the need for information and the requirement that recovery by class members not be too severely conditioned on participation in the litigation.

In *Robinson* the supplemental notice exacts too much from the class members in two respects. First, the notice does not ask for specific factual information that laymen can supply without reliance on legal counsel. By leaving class members to discover on their own whether any remedies might be available to them, the court burdens them with a legal determination. This discovery process would be expensive and time consuming for laymen, who probably would have to consult lawyers. The notice, therefore, impermissibly encumbers the rights of class members to benefit from the action. Second, the court announced too early in the litigation that the members would have to appear in court to prove their claims. Because personal appearances impose significant burdens, the request for them should not occur until the district court has determined that the judgment in the action requires them. Only if written submissions and the trial record fail to provide

an adequate basis to determine remedies should class members be required to argue their cases in person.

For these reasons the district court abused its discretion by conditioning ultimate recovery of noninjunctive relief on the workers' responses to the supplemental notice. Because we have already remanded the case, I would merely add this conclusion to the remand order and instruct the court to issue a new supplemental notice, consistent with this opinion, to those class members who may deserve recovery of back pay because of discrimination in job promotions. A sample notification appears in the margin.[5]

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[5] Supplemental Notice: You are hereby notified that the United States District Court for the Southern District of Alabama continues to consider a lawsuit against the Union Carbide Corporation, Materials Systems Division, filed on behalf of black employees. The court must now decide whether to award back pay to any employee or former employee who suffered job discrimination because of promotion policies of the Division.

Before the court can award back pay, it must evaluate the individual claims of job discrimination by employees and former employees. If you are black and an employee or former employee of the division, by filling out the enclosed form you will enable the court to determine whether you should receive an award of back pay. If you do not return the form, you will not receive an award. Please send the form to the court at Post Office Box 1964, Mobile, Alabama 36601, postmarked no later than (date).

Supreme Court, U. S.
FILED
JUL 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1570

FREDDIE D. ROBINSON, *et al.*,

Petitioners,

v.

UNION CARBIDE CORPORATION,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent Union Carbide Corporation prays that a writ of certiorari not issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED

When the findings of fact of the trial court are adequately supported by the evidence in the record and were not induced by an erroneous view of the law, should they be set aside?

Should statistical data received as evidence in a civil rights case be closely scrutinized by the court?

STATEMENT OF THE CASE

This case was filed as a class action in the United States District Court for the Southern District of Alabama alleging violations of the Civil Rights Acts. The plaintiffs were black employees of the defendant, Union Carbide Corporation, (hereinafter called Union Carbide) at its Mobile County, Alabama, plant or unsuccessful black applicants for employment. This plant began operations in 1965 and is a high technology plant that manufacturers a product that strains or filters liquid or gaseous molecules.

During 1973 this plant employed approximately 314 people. Approximately 180 of these were hourly employees with the remaining 134 being salaried. Of the 134 salaried employees 71 were engineers or technicians. Approximately 26 percent of the hourly employees were black while the number of black or other minorities in the Mobile area work force was approximately the same.

During the period 1965 through 1969 Union Carbide hired 37 black employees and 166 white employees, while during the period 1970 through 1973 it hired 47 black employees and 93 white employees. Union Carbide had black and other minorities employed in the following salaried positions: production foremen, employee relations assistant, plant accountant, quality control shift leader, quality control technician, quality control analyst, junior instrument technician, engineer, buyer, production clerk, stenographer and clerk typist. There was only one member of a minority group employed as an engineer by Union Carbide although a concerted effort had been made by it to obtain applicants without success. The hourly jobs at the plant were in the areas of production, maintenance and warehousing with the great majority of the hourly employees being classified as chemical operators in production. These chemical operators operate, regulate and control chemical processing equipment.

Blacks were also employed in maintenance as maintenance mechanics, oilers, helper trades and stores attendants and in warehousing as warehousemen.

All hourly jobs were filled on a seniority bid basis with the skilled maintenance jobs requiring demonstration of the skill involved. Production jobs were worked on a rotating shift basis. Union Carbide accepted applications for employment at all times whether or not vacancies currently existed and had an actively implemented affirmative action program for seeking, hiring, training and promoting minority citizens.

The substance of the petitioners' contentions against Union Carbide revolve around alleged hiring and promoting discrimination.

The parties in their pleadings and by the pretrial order in the district court defined the following triable issues:

1. Were Cynthia Caldwell and Ronald Coleman denied employment by the defendant on account of unlawful racially discriminatory hiring policies?

2. Do the defendant hiring policies and practices have a racially discriminatory impact on blacks? If so, can any or all of these policies and practices be justified by business necessity?

3. Do the defendant promotion policies and practices have a racially discriminatory impact on blacks? If so, can any or all of these policies and practices be justified by business necessity?

4. Were Freddie Robinson, Thomas Austin, Willie Jones, Oleny Lucious, Willie J. Mickles, Peter Reese, Jerome Fitts, and Paul Richardson denied promotions on account of unlawful racially discriminatory policies and practices?

5. If proved, do the facts herein agreed upon and contested constitute violations of the rights of plaintiffs and the class they represent under Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866.

Union Carbide contended that its employment record spoke for itself. Twenty-six percent of the hourly employees were black while the Mobile area black work force was approximately the same. There was no substantial disparity between the percentages of black employees of Union Carbide and blacks in the labor force. Approximately 31 percent of

the employees hired by Union Carbide since 1970 have been black.

Union Carbide contended that it had promoted and hired blacks and other minorities into foremen, personnel, accounting, purchasing, stenographic, clerical, quality control, engineering and instrumentation salaried jobs and was implementing its adoptive affirmative action program and actively seeking blacks and other minorities for engineering and technical jobs. Union Carbide contended that promotion procedures did not depend upon the subjective recommendation of an employee's immediate supervisor but required a diversified input of names and applications for the vacancy.

After extensive discovery, a pretrial conference was held wherein the questions to be determined by the hearing were delineated. Though these triable issues were reduced to said five in number, the main point advanced throughout the entire course of this litigation, both in arguments on motions, in conference, and upon the trial itself, was the expressed desire of the petitioners' counsel, through the aegis of this class action, to establish a new requirement of law, to become applicable nationwide, relative to the hiring practices of industry as they deal with minority employment problems; viz, whether or not the rule established, or fastly becoming so, that industry must demonstrate a ratio of minority to majority employees commensurate with that in the labor market available, failing in which there is prima facie discrimination, is the appropirate rule, or whether or not the better rule would be that the employment ratios must equal the application ratios. Translated to the case at hand, it was argued that where it is shown that as to the hourly rate employees 26 percent were black and 74 percent were white, closely paralleling the work force ratio in the Mobile area, there was invidious discrimination being practiced by the employer because the application ratio was more nearly 50-50, and unless the employment practices were or are such as to accomplish this ratio in employment, it is prima facie that the employer is practicing racial discrimination.

REASONS FOR NOT GRANTING THE WRIT

I.

FINDINGS OF FACT IN TITLE VII CASES ARE REVIEWED IN THE SAME MANNER AS ANY OTHER TRIAL COURT FINDINGS: THEY SHOULD NOT BE SET ASIDE UNLESS SUCH FINDINGS ARE CLEARLY ERRONEOUS.

The United States Court of Appeals for the Fifth Circuit is committed to the proposition that findings of fact in Title VII cases are reviewed in the same manner as any other trial court findings: they will not be set aside unless it is concluded that such findings are clearly erroneous. See *Smith v. Delta Airlines*, 486 F.2d 512 (5th Cir. 1973); *Terrell v. Feldstein Co.*, 468 F.2d 910 (5th Cir. 1972); *Fed. R. Civ. P. 52(a)*.

In the present case the litigants proposed separate methods to analyze the hiring data. The petitioners suggested that the total number of applications by black persons is the critical factor to be considered. Their statistical analysis purported to show that blacks file approximately 50 percent of all applications but secured only 26 percent of new hourly positions. Witnesses, however, cast suspicion on the reliability of petitioners' approach, comparing it to "trying" to measure jellyfish with a rubber band [because] you don't know where all the applicants come from . . . [and] how many are duplicated. [S]ome applicants fill six applications a year out. We have even had three or four in one month from a particular applicant." Further, the petitioners offer the testimony and charts compiled by witness Ardura in order to establish that the applicant population at Union Carbide's plant was approximately 50 percent black for the years 1972 and 1973 whereas Union Carbide hired only 34 percent black in 1972 and 21 percent black in 1973. Mr. Ardura testified as follows: that he counted names on applicant flow charts that also noted race; that the flow charts were Union Carbide

business records kept for E.E.O.C. reporting purposes; that in 1962 he determined there were 2,361 applicants with 1,095 being black and 961 being white and 304 unknown; that in 1973 he determined there were 1,809 applicants, 889 black, 804 white and 116 unknown; that the race of a substantial number of applicants during 1972 and 1973 was unknown from looking at the available business records of Union Carbide; and that the plaintiffs' attorney and an employee of Union Carbide attempted to identify the race of a substantial number of applicants that he then placed in his black-white categories. Mr. Ardura testified as follows:

"Q And so I don't misunderstand you, and I don't mean to belabor this, you did not include those applicants who had applied prior to 1972, but were still considered in the active file?

A Correct.

Q And in your numbers, you don't consider what jobs were being applied for by these active applicants?

A Correct.

Q Now, in your raw data of your composite of all applications, I believe you testified, and your statistics show, that you had a substantial number of applicants whose race was unknown?

A Correct.

Q Now, would you explain to the Court, Mr. Ardura, how you handled, from a mechanical standpoint, your determination of an applicant, when you got his name and you went to the flow sheet, and there was no one or two there, there was nothing there, what would be your mechanical process of either putting him in black, white or leaving him in unknown?

A I would ask Mr. James Blacksher or Mr. Carl Inge as to whether or not they would be able to identify this certain person as to either being black or white.

Q Now, did you do that for each one of those?

A Yes.

Q Would you ask both Mr. Blacksher and Mr. Inge on each of the unknowns?

A Yes.

Q And it is your testimony that you transferred some of the unknowns into either the black, white category based on what Mr. Inge told you or what Mr. Blacksher told you?

A That's correct.

Q And then this number - - - if you would, look at your Exhibit there. Do you have that?

A Which Exhibit?

Q #10.

A Okay.

Q On the first page, part one of number ten, in your category, unknown, was a number of three hundred and four.

A Correct.

Q That is the number left after you had transferred some out of that category pursuant to the individual knowledge of Mr. Blacksher or Mr. Inge?

A That is correct.

Q Did Mr. Blacksher or Mr. Inge tell you on what basis they were giving you this information about whether these people were black or white?

A They informed me that you could determine it somehow by the schools that they attended.

THE COURT:

Let me interrupt you a moment. Did you make your computations on the basis of the known race that you were able to determine from the information supplied? Did you ever make that computation, and also make it after adjusting the race by view of what was told you?

A It was made from the composite information of both.

THE COURT:

In other words, you never did make it separate?

A No.

THE COURT:

So, you do not have any figures that would reflect what the actual records show?

A Right.

THE COURT:

Go ahead.

MR. McALISTER:

Q And that same proposition and statement, Mr. Ardura, would hold true, not only for 1972, but for 1973?

A That is correct.

Q And it would hold true for your figures as far as so-called composite applicants and then those contained in the active file, would it not?

A Correct.

Q So, part of your statistical information is based on what you were able to determine from the records out at Union Carbide, and part of it was determined from what Mr. Inge or Mr. Blacksher told you?

A Correct.

Q And you don't know what part is represented by either of those?

A *No, I couldn't say that.*"

In view of the basis of the statistics the trial court stated that "I will say this; on the basis of the evidence before the Court at this time, statistical value of the Exhibits is greatly weakened."

Also, as support for its statistical premise the plaintiffs offered in evidence through witness Ardura the number of persons hired by Union Carbide in 1972 from 1972 applicants and the number of persons hired by Union Carbide in 1973 from 1973 applicants. The plaintiffs' statistics did not count applicants who had applied in prior years but who were hired in 1972 and did not include prior years applicants hired in 1973. For instance, if a black application was filed in December of 1971 and the person was hired in January 1972,

he was not counted as being hired. From aught that appears from the plaintiffs' statistics there were numerous black hires from prior years applications that were not counted. How about the years 1971 when 58 percent of the new hires were black, 1970 when 35 percent of the new hires were black, and 1972 when 34 percent of the new hires were black? Obviously such statistical evidence should be closely scrutinized due to the applicant complexities and the variables involved.

Union Carbide, offering an alternate method of analysis, urged that the employment record should be proportionate to the composition of the local work force. Since 1970 approximately 33 percent of all employees hired by Union Carbide have been black. Operating its plant in an area where the labor force is approximately 26 percent black, Union Carbide presented convincing statistics. Adopting Union Carbide's method of analysis, the district court concluded that the employer has provided truly equal access to the jobs at its plant by blacks and whites and found that this has in fact produced an employee population with substantially the same proportion of blacks as are represented in the Mobile area work force.

The district court and the court of appeals recognized that Union Carbide's method of analysis in this case was more reliable and that petitioners' analysis was subject to suspect data, such as duplication of employment applications and miscalculation of applications reviewed. Under the standard of review in the Fifth Circuit there must be "requisite subsidiary facts to undergird the ultimate facts." *Causey v. Ford Motor Company*, 516 F.2d 416 (5th Cir. 1975). The court of appeals concluded that the record in this case presented sufficient underpinnings to support the ultimate findings that Union Carbide did not engage in discriminatory hiring practices. When the findings of fact of the trial court are adequately supported by the evidence in the record and were not induced by an erroneous view of the law, they should not be set aside.

Also the Fifth Circuit has cautioned that complexities and variables require close scrutiny of empirical proof in civil rights cases. *Pettway v. American Cast Iron Pipe Co.*, supra, p. 231, and *Hester v. Southern Railway Co.*, 497 F.2d 1374 (5th Cir. 1974).

Further, the Fifth Circuit has stated that the smallness of the numbers involved in the statistics in a civil rights case demonstrates that the trial court is not compelled to follow such statistical showing to set in motion the usual presumptions or to make a finding or preference thereon. *Ochoa v. Monsanto Co.*, 473 F.2d 318 (5th Cir. 1973)

Title 42 U.S.C., Section 2000e-2(j) reads:

> "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number of percentage of persons of such race, color, religion, sex, or national origin in any community, state, section, or other area, or in the available work force in any community, state, section, or other area."

This principle was definitely expressed by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424. In a passage which the Fifth Circuit has referred to as "what may be the last word on this issue" *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, the Supreme Court stated:

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." (401 U.S. at 430-431)

To employ any group at a rate that greatly exceeds that group's composition of the work force in the community is to give discriminatory preference in violation of Title VII of the Civil Rights Act of 1964.

Let's examine the evidence offered by petitioners to support their thesis; that is, the hires of Union Carbide should be in proportion to the applicant population. Further, let's be mindful of the admonition of the court in *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) that complexities and variables involved in statistical proof require close scrutiny by the trial court; and the warning of the court in *Hester v. Southern Railway Co.*, supra, that the improper interpretation of statistics may mislead a court's attempt to investigate the existence of discrimination; and the observance of the court in *Ochoa v. Monsanto Co.*, supra, that the smallness of the numbers does not compel a trial court to allow statistics to set in motion a presumptive train.

In this case, the petitioners upon realizing that they could not establish a prima facie case when faced with the employment statistics and area population ratio undertook a new tack; applicant ratio to employment ratio. The facts were: (a) area population of 26 percent black; (b) employment by Union Carbide from 1965-1969 of 37 blacks and 166 whites, 18 percent black; (c) employment by Union Carbide in 1970 of 5 blacks and 9 whites, 35 percent black; (d) employment by Union Carbide in 1971 of 10 blacks and 7 whites, 58 percent black; (e) employment by Union Carbide in 1972 of 25 blacks and 48 whites, 34 percent black; (f) employment by Union Carbide in 1973 of 19 blacks and 68 whites, 21 percent black.

In following this course of applicant ratio to employment ratio the petitioners developed difficulties in two basic areas:

their statistical evidence was faulty and the applicable law did not support their basic premise.

The petitioners' argument also fails to take into consideration the following material facts: the job being applied for by an applicant, the sex, age, size, health and prior work experience of an applicant. All of these factors made the statistical data extremely weak and lacking in substantial probative weight. Further, the applicant ratio is a constantly changing and flexible situation subject to all of the indefiniteness of applicant motivations and qualifications including the possibility of manipulation. The Mobile area work force is a fixed, determinable and recognized grouping and a plant work force with a black-white ratio nearly approximating the area work force with no evidence being presented of any deliberate design toward that end strongly suggests, almost conclusively, that the employer is not discriminating in its hiring procedures. *International Brotherhood of Teamsters v. United States,* ____ U.S. ____ (May 31, 1977)

Therefore, we contend that the petitioners' statistical case failed under close scrutiny. The U.S. Court of Appeals for the Fifth Circuit held in an exhaustive opinion in *Pettway v. American Cast Iron Pipe Co.,* supra, as follows: "The courts have based a finding of adverse impact on data showing the percentages of blacks and whites hired as compared to the percentages of each in the available population. The statistical disparity is held to create a prima facie showing of discriminatory impact and thus invokes a requirement that the job relatedness of the overall selection process should be established." p. 225

Also, this is the requirement of the United States government. The federal regulations implementing the equal opportunity requirements for governmental contracts provide as follows:

> "In determining whether minorities are being under utilized in any job classification the contractor will consider at least all of the following factors: (1) the minority population of the labor area surrounding the facility . . . ." 41 C.F.R. §60-2.11(a)(1)(i) and
>
> "The goals and timetables developed by the contractor should be attainable in terms of the contractor's analysis of his deficiencies and his entire affirmative action program. Thus, in establishing the size of his goals and the length of his timetables the contractor should consider the results which could reasonably be expected from his putting forth every good faith effort to make his overall affirmative action program work. In determining levels of goals, the contractor should consider at least the factors listed in §60-2.11." 41 C.F.R. §60-2.12(a)

Union Carbide has provided truly equal access to the jobs at its Mobile plant for blacks and whites and its plant work force with a black-white ratio nearly approximating the area work force is obviously not discriminating against its applicants for employment as a class. Nondiscrimination in its purest form is so revealed. *International Brotherhood of Teamsters v. United States,* supra. This is not to say that such an employer could not discriminate against an individual job applicant applying for a particular job. But discrimination to a class is nonexistent in such evidentiary circumstances. The Fifth Circuit recognized this difference in *Pettway v. American Cast Iron Pipe Co.,* supra, and *Hester v. Southern Railway Co.,* supra. Pettway was a class action seeking class relief with all the elements of Rule 23 of Fed. R. Civ. P. present; numbers, common question, typical claims and adequate representation. The proof by the plaintiffs in that type of case is classic as heretofore related. There is a discernible correlation between the class and the statistics, between the employees and the area population. The area population is a fixed and recognized grouping. However, once you leave the everspreading all encompassing area population and reduced this side of the equation to the applicants for employment at a particular plant the equation no longer balances because said applicants begin to attain personalities and characteristics that did not exist in the nameless, faceless

area mass. See *Hazelwood School District v. United States*, ____ U.S. ____ (June 27, 1977). It becomes imperative to know something about the applicant: sex, size, age, health and experience; and more importantly, what jobs are open and what jobs are being applied for and is the applicant qualified for the job. Therefore, *applicant ratio should not equal plant employee ratio*, unless it also represents the area ratio.

The Fifth Circuit clearly stated in *Hester v. Southern Railway Co.*, supra, as follows: "Moreover, comparison with general population statistics is of questionable value when we are considering positions for which, as here, the general population is not presumptively qualified" (p. 1379). Also, see *Hazelwood School District v. United States*, supra. The Fifth Circuit held in that case that "The most direct route to proof of racial discrimination in hiring is proof of disparity between the percentage of blacks among those applying for a particular position and the percentage of blacks among those hired for the position" (p. 1379). In that case plaintiff Hester was presenting her own individual discrimination claim as an applicant. The class aspect of the suit had been eliminated. It was imperative for her to prove the disparity between the percentage of blacks among those *applying for a particular position* and the percentage of blacks among those *hired for the position* in order to show discrimination. Her proof in the trial court had been statistical evidence of area population race ratios vs. the number of black-white employees in a particular job at Southern Railway Company. She had equated apples to orchids. In spite of this the trial court found discrimination. However, the Fifth Circuit reversed the trial court and held that comparison with general population statistics is of questionable value when you are considering a position for which the general population is not presumptively qualified. Hence, the requirement that the relevant proof would be to compare the percentage of blacks among the applicants for a particular job and the percentage of blacks hired for the job.

In the case of *Jones v. Tri-County Electrical Cooperative*, 512 F.2d 1 (5th Cir. 1976) an argument similar to the petitioners in this case was made by the employer. The employer contended and the district court found that between January 1971 and September 1973 there were 23 black applicants of whom 8 were hired. In the same time period 159 whites applied, of whom 35 were hired. Thus, the district court pointed out that 24 percent of all the applicants were hired; 34 percent of the black applicants and 22 percent of the white applicants. In view of these applicant-hire percentages, the district court concluded there was no racial discrimination. However, the Fifth Circuit reversed the district court and held as follows:

> "The statistics which the Courts have always considered is the racial composition of the employer's work force as compared to the percentage of the minority population in the employer's service area." p. 2

In conclusion, we say that the law does not support the petitioners contention in this case. If the applicant statistics are to be meaningful, you must look to the particular jobs being applied for and the blacks among those hired for the positions. The petitioners failed to establish a prima facie case of hiring discrimination under the evidence and the law. The trial court's findings of fact and conclusions of law were properly based and duly affirmed by the court of appeals.

CONCLUSION

For the foregoing reasons respondent prays that a writ of certiorari not issue to review the opinion and judgment of the court of appeals.

Respectfully submitted,

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July 25, 1977

CERTIFICATE OF SERVICE

I hereby certify that the foregoing response to petition for writ of certiorari has been served on Messrs. Jack Greenberg, James M. Nabbit, III, Melvyn R. Leventhal and J.U. Blacksher, attorneys of record for petitioners, by mailing a copy of said response to each of them, postage prepaid and properly addressed.

This the 25th day of July, 1977.

VINCENT McALISTER

Of Counsel for Respondent